eral civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State unemployment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal findings submitted by a Federal agency does not consider that there is a basis for making a redetermination, the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

INDEX

499-113—73——1

In the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Alaska

No. 70-92 Cr

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS AND ANDREW JAMES LEONARD, DEFENDANT(S)

DEFENDANT(S)

Indictment for Burglary Not in a Dwelling (Count I) Violation Section AS 11.20.100, Grand Larceny (Count II) AS 11.20.140

THE GRAND JURY CHARGES:

COUNT I

That on or about the 16th day of February, 1970, at or near Anchorage, in the Third Judicial District, State of Alaksa, Joshaway Davis a/k/a Joshua Burl Davis a/k/a Joshuaway Burl Davis and Andrew James Leonard did wilfully, unlawfully and feloniously break and enter a building, not a dwelling, to-wit: the Polar Bar, Fifth Avenue and Eagle Street, where property of value was then and there kept, with intent to steal therein.

All of which is contrary to and in violation of AS 11.20.100 and against the peace and dignity of the State of Alaska.

COUNT II

That on or about the 16th day of February, 1970, at or near Anchorage, in the Third Judicial District, State of Alaska, Joshaway Davis a/k/a Joshua Burl Davis a/k/a Joshuaway Burl Davis and Andrew James Leonard did wilfully, unlawfully and feloniously take, steal and carry away, with intent to permanently deprive the owner thereof, property of value, to-wit: one Mosler safe and a quantity of United States cur-

rency and coin, having a total value in excess of One Hundred Dollars ($100.00).

All of which is contrary to and in violation of AS 11.20.140 and against the peace and dignity of the State of Alaska.

Dated at Anchorage, Alaska this 24 day of February, 1970.

A true bill.

_____,
Assistant District Attorney.

_____,
Grand Jury Foreman.

Witnesses examined before the grand jury:

1. George Weaver.
2. Robert Gray.

No. 7092 Cr.

Superior Court, State of Alaska, Third Judicial District

STATE OF ALASKA

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS AND ANDREW JAMES LEONARD

Indictment: Burglary not in a Dwelling (Count I) as 11.20.100, Grand Larceny (Count II) as 11.20.140.

A True Bill, Ralph N. Dobbs, Foreman, 2/25/70.

Presented to the Court by the Foreman of the Grand Jury in Open Court, in the presence of the Grand Jury and filed in the Superior Court, State of Alaska, Third Judicial District.

A. M. VOKACEK,
Clerk.

By: J. SHORE,
Deputy.

Bail fixed in the amount of $2,000.00 Ct. I, 2,000.00 Ct. II

_____,
Judge.

In the Superior Court for the State of Alaska,
Third Judicial District

No. 70-92 Cr.

[Filed in the Superior Court, State of Alaska, Third District, Dec. 11, 1970, A. M. Vokacek, Clerk, By ———— ————, Deputy]

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS, DEFENDANT

JUDGMENT AND COMMITMENT

On this 4th day of December, 1970, came the attorney for the State of Alaska and the defendant appeared in person and with counsel Robert Wagstaff.

It is adjudged that the defendant has been convicted upon jury verdict of guilty of the offense(s) of Burglary Not in a Dwelling and Grand Larceny as charged in Counts I and II of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Commissioner of the Department of Health and Welfare of the State of Alaska or his authorized representative for a period of four (4) years on Count I and four (4) years on Count II to run concurrent with the sentence imposed in Count I.

It is ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the appropriate officer or other authorized person and that the copy serve as the commitment of the defendant.

Dated at Anchorage, Alaska, this 11th day of December, 1970.

————— ————,
Judge of the Superior Court.

Approved as to form and content:

————— ————.

2 In the Superior Court for the State of Alaska, Third Judicial District

No. 70-92 Cr.

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHAWAY BURL DAVIS, DEFENDANT

TRANSCRIPT OF TRIAL BY JURY, CONTINUED (EXCERPT)

Before the Honorable C. J. Occhipinti, Superior Court Judge, Anchorage, Alaska, September 30, 1970, 2:05 o'clock p.m.

APPEARANCES

For the Plaintiff: J. Justin Ripley, Assistant District Attorney, 1001 Fourth Avenue, Anchorage, Alaska.

For the Defendant: Robert Wagstaff, Attorney at Law, 1208 Gambell Street, Anchorage, Alaska; Irvine Ravin, Attorney at Law, 1208 Gambell Street, Anchorage, Alaska.

3 PROCEEDINGS

The COURT. I'll ask the jurors to step out in the hall for a moment please.

[Whereupon the court excused the jury from the courtroom, after which the following proceedings were had:]

1399.8

Mr. RIPLEY. Your Honor, it's not my—may I be heard briefly?

The COURT. Yes.

Mr. RIPLEY. It's not my purpose to accuse counsel of bad faith, but I suspect that he's acting in an area where he doesn't have complete information and he may not be in fact familiar with the rules applicable. We have in fact a juvenile witness who has in fact—is presently on probation out of juvenile court. He was not waived, he was not bound over as an adult and this person is an essential state's witness, but under the rule, which is juvenile rule 23 and backed up by AS 47.10.080 (g) it is absolutely clear that a juvenile record, with the excep-

tion of sentencing procedures where specifically permitted by the court it's absolutely excluded, privileged, cannot be used. I call the court's attention specifically to those sections. Therefore, it would be my position that if counsel—frankly when it first came out I had thought perhaps to mousetrap him with it, but the tactical dangers of that impressed themselves on me over the noon hour and it's now that I move for a pro-
4 tective order to exclude any attack upon this witness' credibility from that juvenile conviction. I'm not talking about traffic; if he has traffic, have at him, but as to that particular civil determining—it's not a conviction of the court, it's not viewed as a conviction, it's a civil finding and the rule is clear; there's absolutely no way that you can use that. Therefore I resist counsel's use of this. Admittedly, a pretrying the case technique is a very effective one and he's doing a fine job of it, but since I can't wait until cross examination when he asks him that question and jump up and make my point, I move for a protective order at this time. I call the court's attention to those 2 rules and statutes I've cited.

The COURT. First let me ask, is this the witness you're referring to?

Mr. WAGSTAFF. Yes, Your Honor. P haps I could capsulize it for the court.

The COURT. Very well.

Mr. WAGSTAFF. What this is, this is a man named Richard Green, who—is that——

Mr. RIPLEY. Boy.

Mr. WAGSTAFF [continuing]. Right?

Mr. RIPLEY. A boy.

Mr. WAGSTAFF. A boy, all right, a juvenile. How old is he, 16?

Mr. RIPLEY. Sixteen then I believe. He is presently a juvenile.

5 Mr. WAGSTAFF. But at any rate he's on probation for the crime of burglary. He—this safe, the safe in question that was burglarized from the Polar Bar was found either on his property or near his property. He was tied in with it at any rate. He was right there near it. He lives up towards Palmer and that's where this safe was found. The police department went up and talked to him and showed him 6 photographs, one of which was the defendant's, a 10 year old photograph it was then incidentally, and he said immediately—or identified at least Mr. Davis as having been the person that he saw next to the safe. Now my point is this: I'm not attempting to impeach

his testimony really or to use his conviction against him. Certainly if he were on trial a juvenile record could obviously not be used against him. However, this shows an incredible bias and prejudice on his part because this was an identification that he made on the basis of 6 photographs. He was on—it must be remembered he was on probation for burglary. A safe, a burglarized safe was found on his property. Now certainly anyone on probation for burglary, when evidence of another burglary is found on their property is going to be highly suspect and be very nervous themselves and when they tell the police officer that they saw someone else near the safe, the police officer shows them 6 photographs, they are going to be under a lot of non-objective pressure to pick someone out to shift the blame and the focus of the inquiry away from themselves. It's
6 just human nature and it's just logic, whereas if he was not on probation for burglary his identification in the picture would be much more credible because he was under no pressure to identify anyone really except the fact that the property was found on his premises. So what happended was, immediately after—this was just the day after the alleged crime, he identified Mr. Davis from his picture and then he went to a lineup, stuck with that identification in mind and under pressure as the court probably can gather from my question, because Mr. Davis, on the strength of this representation and identification on the picture, was arrested. A search warrant was obtained and he subsequently was arrested. So the pressure was great on this witness, and to deny this knowledge from the jury works irrevocable harm to Mr. Davis because it shows that this witness who identified him, who originally identified him, and this is really the only way Mr. Davis is tied in to this particular burglary at all, is through the testimony of this one witness and I think—I'm sure that Mr. Ripley will agree with that. This witness is a key, essential witness. There is absolutely no way Mr. Davis can be tied in with this particular safe but for this one witness. The other tangible witnesses the state has against him are in the car that Mr. Davis was renting. There were some vermiculite safe insulation fibers obtained that could have come from any safe, not necessarily this safe, but any particular safe, so that evidence is certainly—
is obviously not sufficient to sustain—to even give to a
7 jury if they can't even be tied down to that specific safe, so the one key witness that ties Mr. Davis' presence

to this particular safe that was taken from the Polar Bar is the testimony of this one witness Green. Now if the jury is deprived of the knowledge that he was on probation for burglary at that time, the jury is not getting a true picture of the facts because this is of very high—in fact is incalculably high probative value, the fact that he was on probation. It becomes very clear that pressure was brought to bear as one witness—as the juror said that obviously someone who is on probation for burglary when evidence is found, the pressure is great. Now the whole purpose of protecting juveniles' records is to protect it from being used against them. It can't be in the paper, it can't be used in any further criminal proceedings or anything of this nature against them, and this is good because a juvenile is incapable of committing a crime and it has no relevancy whatsoever for impeachment or anything else for presentation, yet in this case this witness has voluntarily chosen to accuse Mr. Davis. This is something he did on his own, something he really did not have to do, but he did do it, and the fact that he was on probation for burglary will shows bias and some motive on his part for making a hasty decision. I'm not arguing, unless it develops on cross examination that I should, that he's deliberately fabricating or that he was implicated in this robbery, but its shows that he wa—or this burglary, but it shows that he was under a lot of pressure to pinpoint someone, a young man confronted by police officers with a safe on his property, the pictures there, the temptation would be great; he's the one that did it.

The COURT. Well, advise me though. You said voluntarily, what do you mean voluntarily? Is it possible, and I'm not prejudging this of course, but is it possible that he may have identified the defendant from memory that he may have seen him? I mean we're reaching a very set conclusion saying he volunteered this information and he may have picked it out from the air. Now is it possible he may be telling the truth?

Mr. WAGSTAFF. Well, certainly, Your Honor, that's possible. But there's no way of—that's the jury question.

The COURT. So this volunteering that——

Mr. WAGSTAFF. Was he telling the truth, can he be believed, can his identification—is it trustworthy? Now in arriving at that conclusion the jury should be allowed to consider all the factors that go into his mind. Why, if it's not a trustworthy decision, why wouldn't it be.

The COURT. Well, what do we mean volun—did he volunteer to pick this picture out?

Mr. WAGSTAFF. Well, what I meant was that he's not accused of a crime himself; he's not taking the stand; he's not—this isn't being used against him as impeachment purposes, it's being used to show—and the actual fact that he was even convicted is not being used against him or adjudicated to be a delinquent as the correct terminology is, is not being used against him but rather it's going to show the fact that he was on probation just the pressure that he was under, and to deny this knowledge to the jury is—it's a balancing of factors, Your Honor, it's a balancing of protecting this man from knowledge of 12 people whom he'll probably never see again that he's on juvenile record for burglary against Mr. Davis, who's presently on trial for 2 quite serious felonies.

The COURT. What's the statute that you mentioned, Mr. Ripley?

Mr. RIPLEY. 28—correction, Your Honor, I meant 47.10.080(g) is the statute.

The COURT. 47.10.080.

Mr. RIPLEY. These are the rules. I'll find rule 23 for the court to read.

The COURT. 47.10.080.

Mr. RIPLEY. .080(g), Your Honor. I have some information if the court wishes further information on this.

[Pause of 40 seconds.]

The COURT. Is there a rule we're referring to?

Mr. RIPLEY. 23, Your Honor——

The COURT. Yes.

Mr. RIPLEY. Juvenile code—or juvenile rules.

Mr. WAGSTAFF. If the court please, when the court's finished I'd like to be heard briefly a little further.

The COURT. Yes. [Pause of 10 seconds.] Very well.

Mr. WAGSTAFF. Thank you, Your Honor. The rule cited by Mr. Ripley states that no adjudication shall be used [indiscernible] in any court proceedings against a juvenile. Now this is really not what I'm attempting to do. I'm attempting to show that he was—I don't care what he's been—entering adjudication or getting that in, that's method, but in an impeachment I think it's under Sidney versus State, a certified judgment of conviction, and I'm not attempting to do that in this case. I'm attempting to show that this witness was on probation for burglary and therefore his identification of Mr. Davis

must be considered in this light because one of the standard jury instructions is, you can consider and should consider the motive, the self-interests of any witness. Certainly this is the highest self-interest, the interest of self-preservation in identifying another person, and I think it's a complete subversion of that juvenile rule to prevent this fact from coming to the jury in a criminal prosecution for a third person, because as I said, the probative value of this is incalculable and it's a balancing of Mr. Davis' trial for 2 felonies versus 12 people learning that this young man was on probation, and the rights of Mr. Davis I think in this case are paramount.

The COURT. Mr. Ripley.

Mr. RIPLEY. Your Honor, you can call it a piano or a snail, but he's introducing that for one purpose only and that is to attempt to impeach Richard Green and that's all there
11 is to it. Now in the first place convictions and convictions only may be shown. I think it's clear from that statute; I believe it's clear from the rule. A determination in juvenile court is not a conviction. The authorities I'm sure are clear on that. Number (2), that's just basic and I am astounded that counsel would argue otherwise to the court. He's talking about impeachment.

The COURT. I think that's basically what we're talking about, is impeaching this witness.

Mr. RIPLEY. Certainly. He says it's not impeachment then he refers to the court's own instruction.

The COURT. That's the only way we can attack this witness is through the process of impeachment.

Mr. RIPLEY. Now——

The COURT. But then, Mr. Ripley, I'm not convinced that perhaps he may not be entitled to do so, because any witness that comes here before this court to testify is subject to impeachment and I mean the paramount interest of the court is to protect the defendant, this defendant, and anyone that would present himself as a witness, he exposes himself to the dangers of impeachment, and I'm wondering in situations—what if we have a juvenile that's a fantastic liar and he's been constantly in problems with the police and the juvenile courts. Can we safeguard that and protect him at the expense of defendants that may have fabricated stories against them?

Mr. RIPLEY. Your Honor is, I'm sure, well aware of
12 the juvenile system. When a juvenile is no longer amenable, and that is a specific finding by the family court,

to treatment as a juvenile then he is bound over, he's waived over, he's treated as an adult. His situation changes then, but not until there has been a specific finding. Now in this—in the factual aspect of this I do not believe that counsel is fully aware of what occurred. Andrew J. Leonard, who was dismissed out of this case, was a prime suspect. I warned the court that I was involved in this case as intake officer for the district attorney's office right on its very inception and I know who was suspect and I know what the police thought, and Andrew J. Leonard was one of them. They were convinced he was up there at the scene. Now I submit to you, Your Honor, that if they were going to suggest, if they were going to put the heat on this kid, we'd have had 2 defendants in on this same eyewitness, but this boy made an honest identification. He stuck by it, he did not——

The COURT. That isn't the issue, Mr. Ripley. That's a determination of fact that I can't make and I will not make.

[Simultaneous speech.]

Mr. RIPLEY [continuing]. Counsel making it.

The COURT. Well, perhaps. I'm looking at the legality of allowing defense counsel to impeach a witness, in this case a juvenile, by showing his problems with the authorities. I looked at the rule and I think the rule is fairly flexible. In the last line it says, in its discretion, when the superior court in its
13 discretion determines that such use is appropriate.

Mr. RIPLEY. But does that not limit it to sentence procedure, Your Honor? That's the way that rule is worded, I believe.

The COURT. It says, "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Mr. RIPLEY. Both of those must be read together. I see that, Your Honor.

The COURT. Yes, and then, "No adjudication under this chapter * * * may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged * * *" and so forth. "The commitment and placement of a child and evidence given in court are not admissible as evidence against the minor in a sub-

sequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state." I think that's very limited too. I think that I'm inclined to allow the impeachment. I may ask defense counsel rather than bring it out as strongly as he may imply, if the person has had police contact and has been under suspicion himself of certain things and may have been cited for certain things I might allow it in that respect without the actual wording that he may have been on probation as such for a conviction because I don't think there is such a thing in juvenile court. I think I might have to allow the jury to consider that towards his impeachment, because we have a defendant here that must be able to answer his witnesses—or those witnesses against him without a disability against him too. You've got to waive it.

Mr. RIPLEY. Your Honor, evidence of prior bad conduct, absolutely you cannot put that on even for impeachment. What can you show for impeachment? A conviction. That .080(g) specifically says it's not a conviction.

The COURT. Against the boy himself, against a juvenile.

Mr. RIPLEY. Your Honor, may I please have it?

The COURT. Yes.

Mr. RIPLEY. "No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction * * *" It's absolutely precluded, Your Honor. You cannot call it a civil adjudication under that specific language.

The COURT. Let's call it what it is; let's call it what it is. The heck with the word conviction, let's use a word that is proper then. But nevertheless, isn't this defendant allowed to show that this so-called witness has had a problem in juvenile court, that he's been under their surveillance and jurisdiction over a period of time and that he has maybe a problem, and I'm not necessarily saying he's lying or not lying, I don't know, but this is going to be a determination for the court—I mean the jury to determine as a factor. This boy has had a contact with juvenile court. I'll not allow the word conviction because it doesn't exist. But let's face it too; if he had been an adult it would have been a conviction, period, and why should this disability that works in favor of the defendant

work to the disadvantage of this defendant—I mean disability against the witness, work to the disadvantage of this defendant?

[Pause of 30 seconds.]

Mr. RIPLEY. All right, I must disagree——

The COURT. Mr. Ripley, I appreciate your—I know that you want to disagree and you're free to do so, but I firmly believe that we allow juveniles to testify and attack that testimony by the attempt by other counsel to show that they may be fancilful or for some other reasons for the sake of the defendant on trail, and I think we owe the defendant here every opportunity to face his accusors and this man is an accusor.

Mr. RIPLEY. Your Honor——

The COURT. Just because he happens to be a minor doesn't minimize that importance.

Mr. RIPLEY. We're talking about impeachment and a conviction, and that's what we're talking about, as the court
16 has said, is available for the limited purposes of casting into doubt the veracity——

The COURT. Right.

Mr. RIPLEY [continuing]. Even under the broadest expression of the rule allowing the use of convictions, it's allowable only as to his credibility, whether he's telling the truth. Mr. Wagstaff was imputed to this condition of civil conviction a whole gamut of reasons [indiscernible—cough] things of this nature that are well outside, it seems to me, what we use a conviction for, if it were a conviction, which it is not.

The COURT. Well, I've indicated that I would allow Mr. Wagstaff to show that this young witness has had contact with the police and is—has had a problem with them and he's under their supervision and perhaps may have incurred whatever pressure Mr. Wagstaff alludes to it, but as I say, let's avoid the word conviction, let's avoid the word probation, but just I think supervision of some kind as it is I think we can allow it, and then he may argue that that might cast some doubt as to his truth, but I don't think it would be conclusive in any way, no more than conclusive that he's telling the truth.

Mr. RIPLEY. Your Honor, may I ask that the court withhold—it's time for the afternoon recess in any event. I would ask that the court withhold its ruling. It'll be my purpose over the evening to produce to the court such authorities as I can find on this subject. I'm morally certain that I'm correct,
17 and if I'm dead wrong I'll back off of it, but I fear that the court is taking a view that is not in consonance cer-

tainly with the philosophy of the juvenile code and I'm certain that I can find substantial authority against it. If not I'll accede to the court's ruling as stated here, and if the court feels it must rule now——

The COURT. We can't go any further anyway. I have a 4:00 o'clock appeal conference anyway, and to go any further would be impossible this evening and I will extend this courtesy requested by Mr. Ripley, withhold my ruling officially until—if you can come forth with any authorities I of course will consider them, but as I say I feel that the court owes a duty to this defendant just like any other defendant that he must confront his accusors without being tied in his defense. Mr. Wagstaff, if you can assist the court with any authorities I'd appreciate it by tomorrow.

Mr. WAGSTAFF. I'll try to, Your Honor. I'm quite busy.

The COURT. Because I'm certain that both counsel wish the court not to make error in one way or another and I have complete faith in both counsel in this respect, and if you can submit any authorities I'll of course consider them. Can you do so by 9:00 tomorrow so I can spend the time I have between 9:00 and 9:30 reviewing the cit——

Mr. WAGSTAFF. Your Honor, I have to be in court at 9:00 tomorrow in the district court for a [indiscernible—interrupted]——

18 The COURT. Can you drop it—well, I mean can you just drop your memorandum if you have a memorandum in my office at 9:00 and then we'll take it up at 9:30.

Mr. WAGSTAFF. Okay, Your Honor.

The COURT. Very well, will you call the jurors in so I may excuse them for the day.

20 PROCEEDINGS

The CLERK. Superior court for the state of Alaska, third district, with the Honorable C. J. Occhipinti presiding is now in session.

The COURT. Resuming the matter of State of Alaska versus Joshua Davis, 70-92 criminal. We'll wait until the defendant shows. [Pause of 10 seconds.] Let the record show the defendant's present with counsel and Mr. Ripley for the state. At the recess yesterday we were hung up on the protective order that the state requested. The court had made a ruling that I was to allow the police contacts of the juvenile witness that

is apparently to appear for the state against the defendant. This morning Mr. Ripley provided me with a memorandum and Mr. Wagstaff with authority from Wigmore on Evidence, specifically testimony impeachment on page 544, section 980, subsection (7) specifically, and I've also consulted with Judge Butcher and discussed the juvenile code and our supreme court rulings on the matter. At this time, Mr. Ripley, do you wish to make further argument?

Mr. RIPLEY. I would stand on my memorandum, Your Honor. It's hastily done but I think it covers the ground and it clearly asserts that convictions only may be shown for purpose of impeachment and it's likewise clear under all the authority that a juvenile adjudication, a finding of dependency, delinquency, any contacts, supervision of the probation authorities arising therefrom definitely does not amount, under any guise, as a conviction. Thank you, Your Honor.

The COURT. Thank you. Mr. Wagstaff——

Mr. WAGSTAFF. Thank you, Your Honor.

The COURT [continuing]. For the defendant.

In the Superior Court for the State of Alaska, Third Judicial District

No. 70-92 Cr.

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS, DEFENDANT

TRANSCRIPT OF TRIAL BY JURY, CONTINUED (EXCERPT)

Before the Honorable C. J. Occhipinti, Superior Court Judge, Anchorage Alaska, October 1, 1970, 10:06 o'clock a.m.

APPEARANCES

For the Plaintiff: J. Justin Ripley, Assistant District Attorney, 1001 Fourth Avenue, Anchorage, Alaska.

For the Defendant: Robert Wagstaff, Attorney at Law, 1208 Gambell Street, Anchorage, Alaska.

Mr. WAGSTAFF. Yes, Your Honor, I agree with Mr. Ripley and I'm familiar with the criminal rule or civil rule that allows impeachment by conviction and I think it's Sidney versus State

that explains the manner in which this is to be done. Certainly if this particular witness, witness Green, were going to testify and he had—were a witness say—let me say this, say he were a witness to the actual burglary, say he were going to testify, yes, I saw Mr. Davis burglarize the Polar Bar; I was there, I happened to be driving by and I observed him, then I agree as far as under the law, what the law is, I don't necessarily agree with the law, but I realize that's what the law is, that I could not bring in the fact that he had been convicted of any other crime or adjudicated to be a delinquent, because really it wouldn't have any relevancy, but for to show his bad character and to try to impeach him in that way, but the fact that he had committed a crime and the fact that he observed Mr. Davis do something really are—the only relationship they would have in that case would be to just discredit this witness to make him appear to be untrustworthy. But this case, the facts are considerably different, Your Honor. This case I'm offering the fact that he had been guilty, whatever you want to call it,
22 adjudicated to be a delinquent is the magic word—magic phrase, because he had committed what would have been in an adult the crime of burglary, actually 2 incidents as I understand of breaking into cabins. Now what I'm offering this for is not to per se discredit the witness, although I suppose this is the ultimate idea, but rather to show bias and prejudice on his part. In other words, this property was somehow tied in—this safe that was found was somehow tied in with him because the police officers, according to the affidavit, which the court has on file of George Weaver on the search warrant question that was argued earlier, the chief investigator in this case talked to Green about this safe, so I'm offering it for this purpose only, not as a judgment and conviction to impeach him, but to show bias and prejudice on his part, that is a lot of pressure would be brought on him personally because the police would obviously know that he in fact has a burglary record, albeit juvenile, this would be a fact known to the police. Certainly any good police officer, anyone else for that matter, would automatically suspect him; that's human nature. Here's a boy who not too long ago has been adjudicated to be a delinquent because he committed 2 acts of burglary. Burglarized property, a safe that was burglarized from the Polar Bar is connected with him. The obvious conclusion, he's the first suspect and the most logical

one at that point and I'm sure the police have made this very evident to him and if they didn't he certainly was aware of it when they told him this was burglarized property. He was aware of pressure on him. Now this is to be distinguished from the fact situation I outlined to the court earlier where the witness had just simply observed Mr. Davis to commit the crime of burglary and to breaking and entering say the Polar Bar because there would be no pressure of his prior convictions, he would not be a suspect necessarily. They would believe him as readily as anyone else. Just the fact tha he was a criminal himself would just affect hi .edibility somewhat but as far as bias and prejudice, the ...t that he would personally have something to gain from this, that would be irrelevant because he would have nothing to gain fro· 's, he just was doing his civic duty and the question of ... prior record would just affect his interpretation of civic duty. But rather this shows bias and prejudice on his part, self-interest, which is certainly one of the key court standard instructions that a juror in evaluating a witness' testimony is allowed to consider his interest in the case. Now certainly I can't conceive of a much more vested interest when someone on the center of a criminal inquiry, investigation, is focused on them, to have an interest to exonerate themselves, and simply what happened in this case, Your Honor, is that as I understand it, this witness was confronted with the safe and said well, I saw 2 Negro suspects by this safe, one with a crowbar, certainly a story that even the most understanding, let alone the most cynical of investigators would tend to question at the very ·st, so the police officer in that case showed him 6 photographs of known felons. The photographs that I've seen, they're all as far as I can tell people I know personally who have criminal records and I think they all are. It was of mug shots for one thing. One of them is Mr. Davis 10 years ago and actually if the court were to see it it's sort of difficult to recognize him. Well, at any rate that's irrelevant and I argued it. They showed him 6 pictures and they said well, here are 6 male Negro known felons in the Anchorage area. Now he knows the inquiry's on him; he knows that if he points out someone else the inquiry is going to shift from him to them and that's exactly what it did. I understand he pointed out Andrew J. Leonard and Joshua Davis. They were subsequently arrested. A search warrant was obtained and they both were arrested on the

strength of his identification of these 6 photographs. A day later, or a couple of days later there was a lineup that we've already argued to the court at which I understand Mr. Green was present and picked Mr. Davis out of. So I'm not offering this information, Your Honor, I don't care whether the judgment and conviction or the equivalent of it, the order adjudicating him to be a delinquent is entered and that's the only way of impeaching a witness. That's not what I'm trying to do. I'm trying to show that he had a special interest in this case because the inquiry was on him; there was a lot of pressure on him personally and this is not just to impeach him because of his record but just to show that he has a special interest,
25 and to deny this—I think the court indicated yesterday it saw the essential unfairness of this and after all the rules of law are flexible and it's a perversion of justice to straitjacket justice because of the narrow interpretation of a particular statute and rule relating to these juvenile procedures. And it's quite clear that the judicial—that the legislative intent, and I think it's obvious what it is, that a juvenile can't commit a crime, by definition. Now this is what the legislature decided would be best to do because of a variety of sociological reasons and they didn't want these records to be used against someone at a later time, in other words someone who's been convicted of a juvenile offense, adjudicated to be a delinquent, this record is closed because they want to give someone, a young man, an opportunity to have a fresh life, a new life, and not be burdened down with these convictions. They also don't want it to be used against him at any other time unless it's in sentencing, which the courts can do. But the intent is not to prejudice other members of society. I think Professor Wigmore's statement is quite apt in this case. It is a perversion of these rules to say that a juvenile who's testifying in a third—in an independent proceeding, that these—the fact that he's been engaged in unlawful activity is totally inadmissible. This is not the purpose, the intent of it. In reading—a careful reading of actually the Alaska statute shows this. It says to be used against
26 the juvenile. Now I suppose in one sense it's being used against him to show his personal interest in this case, but I ask Your Honor, to me this seems—there are a lot of legal subtleties we're talking about. To me this seems like a very obvious question of substantial fair play and justice. I ask Your Honor just to think in your own mind if this was a court trial

and this witness testified that he identified Mr. Davis as standing by this safe with a crowbar or at least was in that vicinity and the court did not know that he himself had been guilty of burglary and that there would consequently be a lot of pressure on him by the investigators and this would make his identification of Joshuaway Davis hurried and untrustworthy to say the least and I think when you think of it in that context and think how much more meaningful, think of the first impression Your Honor had when you realized when I explained it to the court that this young man has a burglary record himself, this is a very important fact in showing his personal interest and bias in the case. It's not just showing his bad character because whether he was telling the truth or not, whether he can be disbelieved, I assume—I have no evidence to the contrary to show otherwise, but rather it shows his personal interest, his anxiousness, there's a lot of pressure on him, police officers around him, and this is what we're talking about, substantial fair play and justice for Mr. Davis. And I think it's a perversion of law to exclude in bringing up of the fact of the existence of these pressures on Mr. Green and it's a denial of justice and
27 I consider it a very substantial and naturally a—I was going to use the term outrageous because the emotion of it grabbed me but that's honestly what I feel. I think it's a denial of justice for Mr. Davis in facing his accusor because in considering even the facts of this case, Mr. Green is really the key witness the state has against Mr. Davis. The only other witnesses, the only other evidence is circumstantial and actually not enough I believe even to get to the jury because what it is as I understand it, and Mr. Ripley, correct me if I'm wrong. Mr. Davis had a rented car which was searched after Green identified Mr. Davis and in it was found safe insulation fibers and some paint chips which can be—which the FBI experts as I understand it. I read their reports pursuant to the court's order, can be said to be from a safe, not necessarily this particular safe because it's very common paint to a Moseler safe which is a common brand and also the fibers, so it's impossible to pinpoint that down to this safe, coupled with the fact it's a rented car that he'd had for 10 days and there's no telling how long it could have been there. It's speculation to connect it. Okay. Well, the whole case revolves then around the fact that this witness Green places Mr. Davis at the scene and his identification is the key thing. He's already made a mistake or with-

drawn Andrew J. Leonard's identification. Now when it's coupled with the fact that this identification was hurried, he was under pressure because he was under suspicion himself and that—as I asked one of the jurors it's common to expect
28 a young man or any adult who points someone out in a picture and the guy's arrested and he stands in a lineup, you know, and he says is this the guy, you said it was him. He knows that he said it was him, we've arrested him for it and that's an awful lot of pressure, Your Honor, on anyone, let alone on a young man and I think it just shows a special interest, not necessarily bad faith, but lack of complete reliability and this is something the jury should be aware of. I think the example that Professor Wigmore uses is very apt, a girl engaged in sexual promiscuity and then she's a witness in a trial against someone for say raping her or something of this nature. To deny the jury this fact is an outrage against justice. It's a denial of facing the accusors. Of course this isn't really the man that's accusing Joshuaway Davis, but this man Green, he's the one that identified him, he put the finger on him on the photograph and that's why Mr. Davis is here today, and to deny Mr. Davis the opportunity to show this special interest, his bias, his leaning to make a quick identification is simply not justice and that's all all of us are here to see, and balancing the injustice to be gained to Mr. Davis against the revelation of this activity on the part of Green, there really is no comparison. There are 12 people on this jury; they'll never see this young man Green again in all probability and it just doesn't—it's not fair, that's all I can say in conclusion and I've tried to amplify this to the court. I feel quite strongly about it; probably more—
29 as strong as Mr. Ripley said he did yesterday. I think it's just a clear question. It's just simply not fair. Thank you

The COURT. Thank you, Mr. Wagstaff. The coust has 2 clear questions then at completely opposite poles. I tend to agree with much of what you said, Mr. Wagstaff. Unfortunately the statutes are not always fair and not always even reasonable. I read Wigmore's testimony impeachment. As far as the contacts that the boy may have had with the police, and I'm probably rationalizing somewhat, any other witness who had police contacts, an adult, couldn't be asked about those contacts, so that the question of impeachment is very, very narrow and our supreme court in Gafford placed those limitations in merely admitting the crime and the time and place of the conviction and the sentence and that's all, period. But of juveniles they've

made an exception, and any exception to a law is unfair, I don't care what it is, whether it's taxes or juvenile code or anything else and it is very, very unfair in many areas. I will have to reverse myself to some degree as to what I said yesterday. I will not allow the contact that the juvenile had, his adjudication to be used as impeachment. Not allowing that I can't allow any other contacts he may have had with the police and this probation he was under and anything else cannot be brought out. You can of course argue the fact that the safe was found on his property, that he may have been frightened for his own
30 implication, I think you can argue that very well if you can, and I don't know enough about the facts to go into that and I am certain that Mr. Ripley will be very judicious in his examination of this young boy and just to highlight perhaps the ridiculousness that you point out, Mr. Wagstaff, we are on record now, public record on what we're trying to protect and I agree, to some degree it's almost ridiculous, but I have to follow the law like I ask everyone else to do and I am I think following it.

Mr. WAGSTAFF. Well, Your Honor, will you permit me to ask anything in this line on——

The COURT. Police contacts, no. As I say, I feel the police contacts of this witness are no different than any police contacts from any other witnesses.

Mr. WAGSTAFF. Well, how about, Your Honor, just bringing out the fact that he was a—a compromise and probably satisfy everyone as much as everyone can ever be satisfied, the fact that he was in a special status, he was under the supervision of some state agency, whatever we want to call it. I mean I think that that will show that he has—it wouldn't bring in the fact that he had a record, had done anything wrong himself, but the fact that he was under some judicial or quasi-judicial or some whatever we want to call it supervision. I think——

The COURT. In effect you're bringing out the record that we're protecting because any supervision would indicate some antisocial behavior which would be a crime for an adult
31 and most people know that. It's statutory and it's public. I think you can probably bring out as strongly as you can that he may have been in fear of being suspected himself without linking any previous contacts. I think this would be fair questioning in cross examination, he maybe feared being suspected, and he probably will answer that in the affirmative

and that might show some bias as you wish to point out. As I say, I'm not siding with the defendant or siding with the state, I'm just trying to tread a very narrow, thin line at this time and it's very difficult for me to do so frankly. I think counsel will appreciate that and I think counsel will see the picture in spite of being on opposite ends of the pole. It's a very, very delicate step that we have here. We're honoring something that our supreme court has said has to be followed; the statute says so and I find it, as I say, in many cases almost ridiculous to follow because we've got it on the record right now. We've got the name of the juvenile, we've got the infractions and everything else, but still we have to protect him.

Mr. WAGSTAFF. Well, Your Honor, I think it's a very sad comment on a criminal trial when the judge as you've—I think you've indicated, feels that this particular rule of law is—that you found existing. I realize you've searched, from your comments on the law, very diligently, but I think it's a sad comment when the judge recognizes this ridiculous rule and perhaps substantial justice is thereby not being done to this
32 defendant and feels obligated to follow the law. I just think it's a sad day, you know.

The COURT. I agree, Mr. Wagstaff. I'm doing this for the record. My comments are for the record because I feel since our supreme court has limited me and the statute limits me and I am here to enforce the law, I have to follow it whether I agree with it or not and whether I like it or not and I'm doing so to the best of my ability although I find moments of rebellion within my own soul. Anything further, Mr. Ripley?

Mr. RIPLEY. No, Your Honor, but since it is a hairline area and since the slightest injudicious [indiscernible—cough] on cross examination can lead to a situation which will become instantly in violation of the court's order, I hope that all parties are clear. It's my understanding that not only will there be no reference to juvenile trials or adjudication, juvenile record, supervision by parole or police authorities, police contacts or police investigation, because anything that opens up anything in that area, support it, goes directly to the adjudication, which is denied.

The COURT. I am granting you this protective order accordingly and Mr. Wagstaff I'm certain will follow it.

Mr. RIPLEY. I'm sure he will.

The COURT. I know he disagrees with me and I, as I say, sympathize, as I stated for the record, but I'm sure that Mr. Wagstaff would be very judicious in his cross examination in that area.

33 Mr. RIPLEY. As long as it's clearly understood.

The COURT. Yes.

Mr. RIPLEY. Thank you, Your Honor.

The COURT. Anything further, Mr. Wagstaff?

Mr. WAGSTAFF. No, Your Honor.

34 CERTIFICATE

SUPERIOR COURT, STATE OF ALASKA, *ss:*

I, Karen W. Kilmer, court transcriber for the third judicial district, State of Alaska, hereby certify:

That the foregoing pages numbered 1 through 33 contain a full, true and correct transcript of proceedings in cause number 70–92 cr., State of Alaska versus Joshua Davis, third district, transcribed by me to the best of my knowledge and ability from third judicial district SoundScriber tapes identified as follows:

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Dated at Anchorage, Alaska, this 26th day of May, 1971.

Signed and Certified to by:
KAREN W. KILMER,
Court Transcriber.

[Inspected by ——— ———, date 5/22/71 Transcript Department.]

35 In the Superior Court for the State of Alaska, Third Judicial District

No. 70-92 CR., No. 70-95 CR.

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUWAY BURL DAVIS, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

September 28, 1970, October 2, 5 and 6, 1970 (Excerpts)

93 Mr. WAGSTAFF. Yes, Your Honor. I have decided that I will make an opening statement at this time.

The COURT. Very well, you may proceed.

Mr. WAGSTAFF. May it please the court, Mr. Ripley, Mr. Ravin, ladies and gentlemen of the jury, at this time I'm going to make the opening statement for the defense. I'm sure

94 you—those of you who have sat on other criminal juries realize that this is unusual. The opening statement is usually reserved, but as you may have indicated—or deducted from the voir dire examination of some length, this is not a standard case. The evidence, as Mr. Ripley has told you that he will produce, in all probability the witnesses will come forward and say what—what he said they did or said they will say. Now the one witness, the one key witness against Mr. Davis is this witness Green. This one if you recall, the one that was at Palmer and he will testify as Mr. Ripley said, about the safe being located there. The evidence that will be brought out on cross examination of these witnesses, of the state's witnesses Green and Investigator Weaver will be that this particular man or boy was himself a suspect of this burglary and he believed himself to be a suspect of this burglary.

Mr. RIPLEY. Object, Your Honor. Did I say that?

Mr. WAGSTAFF. That is what the evidence will show.

Mr. RIPLEY. Oh, excuse me, I thought—go ahead.

Mr. WAGSTAFF. No, I'm sorry, I may have—well, anyway, that's what I am attempting to tell you in opening statement, what I believe the evidence will show. Of course as we've all gone over, what I say is not evidence but I'm attempting to explain to you, as I'm entitled to, what the evidence—what

I expect the evidence will be. The evidence will be that Mr. Green, believing himself to be a suspect of this burglary, identified—made a hasty identification of Mr. Davis—Joshua Davis, from 6 photographs that were presented to him by I believe it was Investigator Weaver, but at any rate one of the Anchorage investigators. This photograph, the evidence will show, was approximately 10 years old and Mr. Green simply made that decision under pressure and said that this is the man I saw standing next to the safe as his story will be, as Mr. Ripley related it to you. The evidence will be that he was then stuck with this story; that as a result of this identification, this snap identification, Mr. Davis was arrested and the wheels of justice were set in motion and that's where we are today. Mr. Davis is sitting here on trial after this identification and subsequent arrest by Mr. Green. The evidence will further show that after making this identification there was a subsequent lineup at which Mr. Green re-identifies Mr. Davis.

Mr. RIPLEY. Excuse me, Your Honor, I really am reluctant to keep interrupting opening argument but these areas that he's opening up are areas which I would submit would be outside the scope of direct unless raised by the state and therefore once again he's putting things before the jury which he has no idea will be developed.

Mr. WAGSTAFF. If necessary, Your Honor, I'll call these as my own witnesses if that's—if it's outside the scope of direct examination.

Mr RIPLEY. Very well.

The COURT. Very well, you may proceed.

Mr. WAGSTAFF. Thank you, Your Honor. The evidence will show that this witness Green then made identification after arrest of Mr. Davis, after Mr. Davis was placed in jail, of—of him in a lineup and that this identification was based upon—solely upon this photograph that he had already identified Mr. Davis from. This is the extent of the way Mr. Davis is tied into this case. The other evidence in the case will be, as Mr. Ripley stated, that in this car that Mr. Davis had been renting for approximately 4 days, there was found some safe insulation fibers—or some insulation fibers that are commonly associated with safes, vermiculite fibers, and some paint chips that could have come from a safe. No evidence at all that this is the same safe, that it's the same fibers, how long the fibers had been there or anything else or—or who else had been renting the car

or anything of this nature, so the evidence will show in this case that the only reason that Mr. Davis is here today is because of this—this snap identification by witness Green of Mr. Davis from a 10 year old photograph while—when he himself believed and was under the pressure that he was suspected of this burglary. That in essence is the case and I ask all of you to listen very carefully to the evidence to find out what the evidence is and to determine whether or not the state has met its burden of proof beyond a reasonable doubt on all issues
97 of the indictment as they're required to do. I would also like to point out that there's absolutely no evidence presented of anyone that saw Mr. Davis burglarize the Polar Bar, no evidence that he was there, no fingerprints, no footprints, nothing. There will be absolutely no evidence connecting him in any way with the Polar Bar and the only evidence as I stated that will connect him even in the vicinity of what was evidently stolen or burglarized from the Polar Bar will be the testimony of this one witness, Green. Obviously his testimony is going to be critical as to—as far as to whether or not you believe him. I request, ask, as I'm sure you will do after hearing what the evidence will be in this case, listen to it carefully. Try and place yourself in his position, how you would feel if you were making this identification and then if you go to the jury room, decide the case on your understanding of the evidence, your understanding of what happened and then place this in the test of beyond a reasonable doubt. Thank you.

The COURT. Thank you, Mr. Wagstaff. Mr. Ripley, you may call your next witness.

* * * * * * *

124 Q. Follow-up investigation, what did you do next?

A. This was on Monday, the 16th of February, 1970, upon arriving to work, it was about 7:30 in the morning as I recall on Tuesday the 17th of February, we had information from a state trooper that the safe had been recovered at mile 25 I believe on the Glenn Highway, or at least had been found there. We had the name of the person who had found the safe and we had information as to what kind of a vehicle had been seen where the safe was found.

Q. This was a report from the state trooper, I take it?

A. Yes, sir.

Q. He had talked to this person——

A. Yes.

Q. [Continuing.] That you're referring to?

125 A. Yes.

Q. Fine. Well, what did you do next? Well, Investigator Gray, let me ask this first. Did you know this person they were talking about?

A. No, I had never met the boy before.

Q. Did you suspect him in any way of having been—having anything to do with this?

A. No.

Q. What did you do next?

* * * * * * *

302 RICHARD LEE GREEN, called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

The CLERK. For the record would you please state your name?

A. Richard Lee Green.

The CLERK. Would you spell your last name?

A. Green.

The CLERK. Would you spell it?

A. Oh, G-r-e-e-n.

The CLERK. And your address?

A. Mile 25, Glenn Highway.

The CLERK. Your occupation?

A. No occupation.

The CLERK. Are you a student?

A. No.

Mr. RIPLEY. Thank you, Your Honor.

303 By Mr. RIPLEY:

Q. Mr. Green, what is your age at the present time?

A. Seventeen.

Q. On the 16th of February, 1970, what was your age?

A. Sixteen.

Q. Very well. You testified that you live at mile 25 on the Glenn, who lives there with you?

A. My stepdad and my mother and my 3 brothers.

Q. Are you presently in school?

A. No, sir.

Q. When did you quit school?

A. I was expelled last year sometime, I don't remember the date.

Q. And for what reason were you expelled?

A. Skipping.

Q. Very well, sir. Since that time what—have you worked?

A. Yes, sir.

Q. What have you worked at principally, sir?

A. Assistant guide in Kodiak and in Palmer for the NYC and now I'm working for the NYC in Chugiak.

Q. What is the MYC that—or NYC that you refer to?

A. It's a youth corps job.

Q. Very well. You say that you now are working at that agency in Chugiak?

A. Yes.

304 Q. How did you happen to take that job, sir?

A. Well, my little brother goes to the school where I'm working.

Q. And how did that fit into your getting the job there?

A. Well, he wouldn't go unless somebody went with him.

Q. I see. What are your duties there with the NYC?

A. Well, I work in the office and sometimes out on the playground and take the kids home on the bus with the busdriver.

Q. Is this a salaried job? Are you paid for this?

A. I am getting paid for it now; I wasn't at first.

Q. Very well, sir. Calling your attention, sir, to the afternoon of February 16th, 1970, did you learn anything about a—a safe that was located on your—yours or your stepfather's property in—in this—at mile 25?

A. Yes, sir.

Q. How did you first come into this knowledge? How did you first find that the safe was there?

A. We met my mother at the little store just above our house there and she told us that they had found one.

Q. How did you know your mother was there?

A. We met her as we were going back to the house.

Q. I see. Who is we?

A. My father and my uncle and I.

Q. Where were you coming from?

305 A. Anchorage.

Q. Very well. Did your—after you met your mother and the situation was explained to you, what was the next thing that you did?

A. I went home with my uncle and my father and he went down and blocked off the road and we waited for the state troopers.

Q. Very well. Was this safe located on or off the Glenn Highway?

A. Off the Glenn Highway.

Q. Mr. Green, if you will please, step to the board and draw a fairly large drawing including the Glenn Highway and this cutoff, the road up to your place, and try to make it large enough so that we can later draw vehicles on it and the jury can see it. Indicate please which direction Anchorage is on the Glenn Highway as well. [Pause to 084.]

A. This is Anchorage here [indicating]——

Mr. RIPLEY. Can—excuse me, can the jury see the drawing and can the jury hear him? Thank you.

Q. Please speak up as loud—loud enough so everybody can hear you.

A. Okay, this is Anchorage and Palmer, and this is where I was living at the time and this is where I'm living now. We had a trail that went down to here and this is where
306 my pickup was sitting in the road. This is where I'd seen the vehicle right here [indicating].

Q. Very well, sir. Can you give us an approximate distance from your—from one house to the other?

A. Be 400 yards, or something like that.

Q. Now you state at—at this time your—your family was living at which house?

A. This house [indicating].

Q. What were you doing with respect to the lower house?

A. I was going down to get some coffee for my fa——

Q. Well, what was your family doing with respect to the lower house?

A. We was building on this house.

Q. I see. Was anybody actually staying there at this time?

A. No.

Q. Very well. And you testified that—and you've made one diagonal mark on there and said that's a pickup. Would you point that clearly to the jury again.

A. This is the pickup here [indicating].

Q. And how was that pickup parked and whose pickup was it?

A. It was my truck and it was off the side of the road blocking almost half of it.

Q. Very well. And you've drawn on there another car. Would you indicate with an arrow large enough for the jury to see, which direction the front of that car was pointing?

307 Very well. Perhaps for the sake of clarity, would you put the arrow below that car then perhaps with your finger then you can erase the—erase the other arrow that you drew. Thank you. Do you recall—when you were going from your upper house to your lower house, what was your errand at that time? What were you going to the lower house for?

A. To get some coffee.

Q. Who had sent you on this errand?

A. My mom.

Q. What time of day was this?

A. Around noon sometime.

Q. Very well. And you've indicated that you went cross-country; is there a path there or——

A. Yeah.

Q. And would you indicate for the jury just with your hand where that path comes out onto the road again?

A. 'Bout—about here in front of the truck (indicating).

Q. All right. You've also indicated—strike that. Now would you indicate more slowly the route that you took and where you came onto the road with respect to your pickup truck.

A. Well, I came down—we have a [indiscernible] and I came down here in front of the truck and then I went around like that [indicating] you know, in between the car and the

308 truck.

Q. Very well. Did you observe any persons there at that time?

A. Yes, sir.

Q. Very well. Will you make 2 marks on there indicating where these persons were standing?

A. One was here and behind the car, the other one over here alongside of the car [indicating].

Q. Very well. You've indicated that you later in the day went to the site where this safe had been found. Would you please put an S where the safe was found? [Pause.] At the time of your—your first passing through this area, did you observe a safe?

A. No, sir.

Q. Very well. For now would you please resume the witness stand? [Pause.] How long had your pickup truck been parked at that angle, do you recall?

A. About a month, maybe longer.

Q. Do you know the reason why it was parked there?

A. Yeah, it was out of gas.

Q. Will you describe the sedan or other car that you saw there when you went down through?

A. Well, it was a late model Chevy, metallic blue.

Q. Had you ever seen that car before?

A. No, sir.

Q. Have you to your knowledge seen it since?

A. No.

309 Q. Very well. And you testified that 2 persons were standing in the vicinity of the car. With respect to the person that was standing at the back end of the car, did you have occasion to speak to him or him to you?

A. Yes, sir.

Q. You did. Do you recall who spoke first?

A. Yeah, the man behind the car.

Q. What, if anything, did he say to you?

A. He asked me if I lived around there and if my daddy was home.

Q. And how did you answer these questions?

A. I said, yeah, and my dad wasn't there.

Q. He wasn't there?

A. Yeah.

Q. Very well. Did you ask them any questions?

A. I asked them if they needed some help.

Q. Why did you ask that question?

A. Well, I thought they were stuck there, you know, something like that.

Q. What did they say?

A. No.

Q. At that time then what did you do?

A. I went on up to the other house.

Q. By the other house do you mean the upper or lower?

310 A. The house closest to the highway.

Q. Very well. Down closest to the letter P?

A. Yeah.

Q. What did you do when you got there?

A. I got the can of coffee.

Q. What did you do then?

A. Went on back up to the other house.

Q. Do you recall whether you were walking or running at this time?

A. I was running.

Q. How do you know that or recall that?

A. Well, I always run, it's faster.

Q. I see. Was your return route pretty much the same or was it different from the route you took coming down?

A. About the same.

Q. When you returned to the vicinity of the pickup truck and the sedan and the safe do you recall the position of the 2 men at that time?

A. Yes, sir.

Q. And what was the position of the 2 men at that time?

A. About the same.

Q. Very well. With respect to the—well, did you speak to either of them on that trip?

A. I don't think so.

Q. Very well. Do you recall—were—were you walking or running when you went through that area?

311 A. Probably a fast walk.

Q. That's on the trip back?

A. Yeah.

Q. On the trip down were you walking or running when you went through that area?

A. I walked.

Q. Very well, sir. This man that was standing beside the—or at the back end of the car, do you recall whether he had anything in his hand?

A. Yes, sir.

Q. And do you recall what that was?

A. Yeah, it was a—something like a crowbar.

Q. Very well, approximately how long, can you estimate it?

A. Maybe a foot and a half, 2 foot.

Q. Which of the 2 men did you have your conservation with?

A. The shorter of the 2.

Q. Do you recall what he was wearing?

A. Dark coat and dark pants.

Q. That person that you saw and with whom you had that conversation, is he here in the court today?

A. Yes, sir.

Q. Would you indicate for the record who he is?

A. The man in the middle over there [indicating].

Q. By the middle over there you mean this gentlemen
312 between Mr. Ravin and Mr. Wagstaff, the 2 men——
A. Yes, sir.

Q. [Continuing.] With beards? At the time you first saw these 2 men and you say you did not see the safe?

A. No, sir.

Q. Do you—did you attach any particular significance to their being there?

A. No.

Q. Approximately how far—well, when the safe was discovered you said that you went back down there with other members of your family, approximately how far from the position where that sedan had been parked was this safe located?

A. Oh, about—just to the side about a foot behind them in the ditch.

Q. Approximately how far would you estimate from where the—estimate from where the car was parked?

A. Possibly 3 feet.

Q. Now you did not see the safe when the car was parked there?

A. No, sir.

Q. How can you estimate now the position of that safe with respect to where the car was formerly parked, is there any way you can do that?

A. Well, it was—the car was close to the pickup and it left kind of melted spots where the tire was and the exhaust.
313 Q. I see. How many of these melted spots from the tires were there, do you recall?

A. Four.

Q. Do you recall seeing one from each tire?

A. Yeah, you know, a set.

Q. And the spot from the exhaust, do you recall how big around that was?

A. Umm, maybe a foot across, more.

Q. And it's based upon those markings in the snow that you est—that you estimate the distance between the safe—safe and the car, is that correct?

A. Yeah, that and where I remember seeing it.

Q. This man that you've identified here in court today, the defendant, that you say you recall seeing him at the car?

A. Yes, sir.

Q. Is your recollection today based strictly on that?

A. Yes, sir.

Q. Did you have occasion after this time to identify this man from a series of pictures?

A. Yes, sir.

Q. Did you have any trouble doing so?

A. No, sir.

Q. Did anybody suggest to you which of these pictures was the man that was suspect?

A. No, sir.

Q. And was your identification of the man in the picture based upon your recollection of his presence on the road
314 that day?

A. Yes, sir.

Mr. RIPLEY. I have no further questions of this witness, Your Honor.

The COURT. Thank you, Mr. Ripley. You may cross examine, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

RICHARD LEE GREEN, testified as follows on:

CROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, as I understand it, you went down to the police station, the Anchorage city police station by yourself, or at least as far as your family is concerned, but in the company of 2 police officers, Investigator Gray and Investigator Weaver?

A. Yes, sir.

Q. Were you upset at all by the fact that this safe was found on your property?

A. No, sir.

Q. Did you feel that they might in some way suspect you of this?

A. No.

Q. Did you feel uncomfortable about this though?
315 A. No, not really.

Q. The fact that a safe was found on your property?

A. No.

Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

A. I thought they might ask a few questions is all.

Q. Did that thought ever enter your mind that you—that

the police might think that you were somehow connected with this?

Mr. RIPLEY. I'm going to object to this, Your Honor, asked and answered. It's a minor paraphrase of questions that have been asked and answered.

The COURT. It's paraphrased again. I'll allow it, just hopefully we don't get too deep in repeating it, but I think you are repeating the question. He may answer it if he can.

A. No, it didn't really bother me, no.

Q. Well, but——

A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, not that you——

A. That came across my mind, yes, sir.

316 Q. That did not cross your mind?

A. Yes.

Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

A. Yes, sir.

Q. And then went into the investigators' room with Investigator Gray and Investigator Weaver?

A. Yeah.

Q. And they started asking you questions about—about the incident, is that correct?

A. Yeah.

Q. Had you ever been questioned like that before by any law enforcement officers?

A. No.

Mr. RIPLEY. I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind——

The COURT. I'll sustain the objection.

Mr. RIPLEY. The suspect, he's——

Q. How long were you there, Mr. Green?

A. At the police station?

Q. Yes.

A. Oh, I don't know, not too long, maybe a half an
317 hour at the longest.

Q. How long had you been there before they produced these pictures?

A. Five minutes or so, I don't know, it wasn't very long.

Q. They—they produced 6 pictures and you identified one from—from that batch, did you not?

A. Yes, sir.

Q. Did this picture look exactly like the person that you had seen?

A. No, not exactly.

Q. What was the difference?

A. Well, the man didn't have a mustache on, I don't believe.

Q. What did you do after you left the police station, go back to Palmer?

A. Back to my house, yes.

Q. Did they drive you back?

A. Yeah.

Q. Then you came down the following day, did you not, back to the police station?

A. Yes, sir.

Mr. RIPLEY. I'm going to object to this, Your Honor, as outside the scope of direct——

The COURT. I assume——

Mr. RIPLEY [continuing]. As well as getting into an area in which I believe defense counsel's raised an objection
318 and been sustained.

The COURT. Mr. Wagstaff.

Mr. WAGSTAFF. Yes, Your Honor, what I'm attempting to show here is getting into, of course, the lineup, the fact that there was identification later and that his identification today is based upon—somewhat based upon his identification at the lineup.

Mr. RIPLEY. Your Honor, when I se—when I attempted to do it, I hate—you know, I didn't even want to use that magic phrase but when we got into this area with other persons, objection was raised and that's why I stayed away from it with this witness.

The COURT. I'll overrule the objection. Counsel has opened this and now he can examine it and I'm sure that you can——

Mr. RIPLEY. May we be heard very briefly before the bench, Your Honor?

The COURT. Yes.

[Whereupon there was a brief whispered conversation at the bench and the following proceedings were had:]

The COURT. You may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, you then went down and participated in what's called a lineup, did you not?

319 A. Yes, sir.

Q. And roughly probably you went down and talked to one of the police investigators first before you went in to the lineup?

A. Yes, sir.

Q. And they had several persons, do you recall how many, in a room that you——

A. No, sir.

Q. Less than 10 or more than 10 would you say?

A. I don't know. I think it was around 10, I——

Q. And you walked through the room with one of the investigators?

A. No, sir.

Q. What—how did you happen to observe these persons that you described?

A. Well, they were up against the wall. I just walked through the doorway.

Q. Into the same room where they were or——

A. Yes, sir.

Q. I see. You identified 2 persons, did you not?

A. Yes, sir.

Q. And one of these persons later turned out to—well, let me say this, didn't one oft he police officers after you identified these 2 people say that it was impossible for one of them to have been the person that was there?

320 A. Yes, sir.

Q. Now is Joshuway Davis, the defendant, the person that you saw at this lineup?

A. Yes, sir.

Q. Now when you think back on this incident, this—both the lineup and the photographic identification and this incident out at mile 25 occurred at approximately the same time, did they not?

A. Yes, sir.

Q. So when you think back on it are they sort of meshed together in your memory as happening all about the same time?

Mr. RIPLEY. I'm going to object to that, Your Honor, as quite—well, with that clarification I guess my objection is not so well taken. I thought it was quite a vague question. Perhaps it could be rephrased.

The COURT. You may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Yes.

Q. Meshed toge—what I—what I meant, Mr. Green, meshed together in your memory as all having happened roughly the same time?

A. Yes, sir.

Q. Now when you identified Mr. Davis today in court, can you really separate in your own mind the fact that he was also the person that you identified in the lineup?

321 A. Yes, sir.

Q. You—are you sure you can?

A. Yes, sir.

Q. There's no—there's no—well, let me—let me say this; let me start over. He is the person you identified in the lineup, is that correct?

A. Yes, sir.

Q. And when you think back on—on this incident, do you feel that when you—when you think of Mr. Davis and think of him and seeing him today, you think of him probably, I assume, as the person you saw at the lineup and the person you saw—you identified——

Mr. RIPLEY. I'm going to object to that, Your Honor, as a—an assumption of counsel not based upon the facts before us. He's testified at least twice that I can recall that he has these matters separated in his mind, that his identification goes from that confrontation back on the road and now counsel said, I assume from your testimony that it's based upon the lineup. Now that is an assumption not based upon facts of record Your Honor.

Mr. WAGSTAFF. Your Honor, I hadn't finished my question and perhaps . . . .

Mr. RIPLEY. Well, I object to the question in its narrative rambling form then and for its assumptions.

The COURT. Mr. Wagstaff, you may continue.

322 Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, let's see if I can remember where I was—Mr. Green, you recall I talked to you last Friday in the hall, do you not?

A. Yes, sir.

Q. And we discussed this very question, did we not, concerning the distinction between lineup identification and whether there was one between the—your memory back and what happened at Palmer or the Glenn Highway?

A. Yes, sir.

Q. And you recall, do you not, that you told me that as far as making a complete separation in your mind that due to the fact that you had not seen Mr. Davis since these 3 incidents, these 3 times you say you saw him in February, that you could not really say for sure whether or not his identification in court would be strictly as the person you saw at the lineup, strictly as the person you saw in the photograph or strictly as the person you saw on the—at mile 25 on the Glenn Highway but it was rather all of these, didn't you tell me that?

A. No, sir, I didn't.

Q. Well, what did you tell me?

A. I said; sir, I couldn't make a positive identification until I saw the witness.

Q. Till you saw him in court?

323 A. Yes, sir.

Q. As far as your own mind sitting out there before we went into court today, or this was on Friday that I'm referring to, it was all meshed together in your memory at that time, the 3 incidents.

A. No, not really.

Q. Well, what did you mean, what did you tell me? Am I misstating what you told me?

A. Well, I—I can't remember exactly what I said to you, but I said I remembered him from—from the car when I see him in the pictures and from the car when I see him in the lineup and I—you know, there's a difference there.

Q. Didn't you tell me that as far as separating the 3 that it was very difficult for you do this in your own memory?

A. Right now it would be, yes.

Q. Right now it would be, that's what I'm talking about.

A. Well, I can't remember what the pictures looked like.

Q. You can't remember what the picture looked like?

A. No, I can't right now.

Q. So as far as today—now we're talking about today, Mr. Green. I realize these questions we're talking about 3 different—or actually 4 different incidents over a long time span, but

as far as today, when you think back on Mr. Davis who's sitted—seated right here [indicating] can you really dis-
324 tinguish between these—the 3 identifications you say you made of him back in February?

A. I can't remember him from the picture right now or from the lineup, but I remember him from the car.

Q. From the car you say?

A. Yes, sir.

Q. This is not what you told me last Friday.

A. I says I——

Q. Is it?

A. I said I couldn't make a positive idenica—identification until I did see the witness. I've seen him and I can make it now.

Q. What about at the lineup, you don't remember what he looked at—looked like up at the lineup?

A. Yes, I did then and I—I don't——

Q. You don't now though?

A. I'm not saying that.

Q. Well, you just said that you don't remember what he looks line in the lineup and the picture yet you remember another incident that happened prior to those 2. Doesn't that seem a little strange to you?

A. No.

Q. You're saying though today, I'm not misunderstanding you, that you don't remember what he looked like at the lineup and you don't remember this picture you saw of him?

325 A. Not very clearly, no.

Q. But yet you do remember identifying him in that picture that we're referring to and in the lineup?

A. Yes, sir.

Q. Were you in any hurry in the lineup?

A. No.

Q. And you were specifically looking for someone in the lineup, weren't you?

A. Yeah.

Q. And trying to see if you could remember this someone at the lineup, were you not?

A. Yeah.

Q. And when you saw these 2 Negro males on—at mile 25 Palmer highway, you were not specifically trying to remember what they looked like at that time, were you?

A. No, sir.

Q. You were not trying to picture their description in your own mind, what they had on, what they looked like or height or anything else, were you?

A. No.

Q. 'Cause you didn't really suspect anything was—strange was going on did you at that time?

A. No, sir.

Q. Which of the persons did you talk to at the car?

A. The man behind the car.

326 Q. Now was he the taller or the shorter of the 2?

A. The shorter of the 2.

Q. By behind the car what do you mean, behind the car with reference to where you were standing or what?

A. Well, in the rear end of the car, towards the trunk.

Q. At the—behind the rear of the car. Where were you standing?

A. Well, I was walking by at the time. I'd say behind the car too.

Q. Where was this other man standing?

A. On the other side of the car.

Q. From you?

A. Yes.

Q. There was—the car was between the 2 of you?

A. Yes, sir.

Q. And where were—you were standing in the back of where? I'm sorry, with reference to the side of the car?

A. Well, practically in front of the man behind the car.

Q. Practically in front?

A. Well, to his side and then to his front as I went on by.

Q. How far away from him were you?

A. Possibly 3 feet.

Mr. WAGSTAFF. May I have one moment, Your Honor.

The COURT. Yes.

327 Mr. WAGSTAFF. No further questions, Your Honor.

The COURT. Very well. Any redirect, Mr. Ripley?

Mr. RIPLEY. Yes, Your Honor.

RICHARD LEE GREEN testified as follows on:

REDIRECT EXAMINATION

Q. At the lineup, sir, will you just tell the jury in your own words—let me ask you specific questions. Who brought you to the station for the purpose of viewing this lineup?

A. Detectives Weaver and Gray.

Q. Where did they have you wait during the time that they were preparing the lineup?

A. Oh, there's a little office, I don't know, across the hall and down a ways I guess.

Q. Very well. You testified that there were a number of people in this lineup?

A. Yes, sir.

Q. What race were these people?

A. Colored people.

Q. Had you seen any of the persons in that lineup coming and going in front of any door or window in the office where you were kept?

A. No, sir.

Q. Did Investigator Gray, Investigator Weaver or
328 any other person suggest to you who you would or should pick out of this lineup?

A. No, sir.

Q. Did Weaver or Gray or any other person accompany you into the room where the lineup—or the viewing was conducted?

A. I think Detective Gray did.

Q. Do you recall his instructions to you prior to going into the lineup?

A. Yes, sir.

Q. And what were his instructions to you?

A. Well, all the men had numbers on them and I was to pick out the 2, you know, that I remembered and then go back into another room and tell him the numbers.

Q. Very well. And by numbers can you describe particularly what type of numbers, sir?

A. Well, they had little square cards, you know, with 1, 2, 3, 4 and like that.

Q. In other words a single digit number, one of them number one, one of them had 2 and the like?

A. Yeah.

Q. Not a great row of numbers?

A. No.

Q. Do you know whether any other person looked at this same lineup of people with a—you know, to make an identification such as you did?

329 A. Yes, sir, I think there was a——

Q. Well, that's—yes or no?

A. Yeah.

Q. Did you talk to that person either prior to or—before going in and making your identification or after you came out?

A. No, sir.

Q. The answer was no?

A. Yes.

Mr. RIPLEY. If I may have a moment, Your Honor.

[Whereupon there was a brief whispered conversation and the following proceedings were had:]

The CLERK. Plaintiff's 35 marked for identification.

[Plaintiff's exhibit 35 identified.]

Q. I hand you, sir, what has been marked plaintiff's 35 for identification and ask if you can tell us what that is.

A. That's the lineup where I was sent—or you know, where I went.

Q. Very well. And do you recognize the participants there?

A. Yes, sir.

Q. Do you recognize the defendant——

A. Yes, sir.

Q. [Continuing.] In that picture? Does he look different in that picture than he did on the road that day?

330 A. Yes, sir, I don't think he was wearing glasses at the time.

Q. You stated earlier that there may have been as many as 10, you were uncertain as to the number of persons in the lineup?

A. Yes, sir.

Q. And how many persons are there in that lineup?

A. Seven.

Q. And they're all bearing the little numbers you testified to?

A. Yes, sir.

Q. Are the numbers in order?

A. No, sir.

Q. Did anybody give you any clues as to what number——

A. No, sir.

Q. [Continuing.] You were looking for? Do you recall how much—how many days there were between these occurrences? For example, how many days after you found the safe was it when you identified the defendant's picture?

A. I think there was about 2 days.

Q. And how many—how many days, if you recall, were there

between identifying the picture and picking them out of the lineup?

A. I think there was just one day.

Q. Mr. Green, when you identified the defendant at
331 the lineup were you certain in your own mind that you were right?

A. Yes, sir.

Q. Did you pick out somebody else at that lineup?

A. Yes, sir.

Q. Were you certain of him?

A. No, sir.

Q. And you told one of the detectives that, didn't you?

A. Yes, sir.

Mr. WAGSTAFF. Objection, Your Honor, that's——

Mr. RIPLEY. Leading. I—I would—I'd withdraw the question.

The COURT. Yes, it's leading. I'll sustain the objection.

Q. Did you make a statement to one of the detectives as to your certainty as to the other person?

A. Yes, sir.

Q. Do you recall what you told him?

A. Yes, sir.

Q. Please tell us.

A. I told him that I wasn't sure about—I forgot what number it was, but I told him I wasn't sure of that number.

Q. But the number of the defendant you were sure, is that correct?

A. Yes, sir.

Mr. RIPLEY. No further questions.

The COURT. Any recross?

332 Mr. WAGSTAFF. Your Honor, may I approach the bench with counsel briefly?

The COURT. Yes.

[Whereupon there was a brief whispered conversation at the bench and the following proceedings were had:]

Mr. WAGSTAFF. May I approach the witness, Your Honor?

The COURT. Yes.

RICHARD LEE GREEN, testified as follows on:

RECROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, do you recognize this statement?

A. Yes, sir.

Q. That's the statement you gave and signed?

A. Yes, sir.

Q. And this was the 17th day of February, 1970, I believe it's dated?

A. Yes, sir.

Q. And that statement is true and correct, is it not?

A. Yes, sir.

Mr. RIPLEY. Excuse me, in this regard, I know it's probably not customary for me to interrupt on voir dire, I have reason to believe—well, perhaps I should approach the bench if I may.

333 [Whereupon there was a brief whispered conservation and the following proceedings were had:]

The COURT. Very well, you may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, could you read the second sentence there commencing with I observed?

A. I observed a late model metallic blue Chevrolet stopped at the end of this side road. It had its engine running and I observed 2 colored male—males standing by the rear of the vehicle.

Q. That's the statement you gave on February the 17th?

A. Yes, sir.

Q. Thank you.

Mr. WAGSTAFF. I have no further questions, Your Honor.

The COURT. Anything further?

RICHARD LEE GREEN, testified as follows on:

REDIRECT EXAMINATION

By Mr. RIPLEY:

Q. With respect to that last question, did you—well, let me ask you this, how was the statement taken? Did you dictate it into a microphone or did you tell the police and have them write it down or how did that go?

A. I believe I was talking to 2 policemen.

Q. Are some of the words used in there your words?

334 A. No, sir.

Q. Well, are—are some of them your words?

A. Oh, yes, I mean, you know——

Q. Are all of them your words?

A. No, sir.

Mr. RIPLEY. Nothing further, Your Honor.
The COURT. Anything further, Mr. WAGSTAFF?
RICHARD LEE GREEN, testified as follows on:

RECROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, did you read that statement over before you signed it?
A. I don't remember. I believe I did.
Mr. WAGSTAFF. No further questions, Your Honor.
The COURT. Anything further from this witness?
Mr. RIPLEY. No, Your Honor.
The COURT. Very well, Mr. Green, you may step down and thank you.
A. Yes, sir.

* * * * * * *

The Supreme Court of the State of Alaska

[File Nos. 1428 and 1436]

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS, APPELLANT

v.

STATE OF ALASKA, APPELLEE

OPINION

[No. 816—July 28, 1972]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, C. J. Occhipinti, Judge.

Appearances: Robert W. Wagstaff, Anchorage, for Appellant. John E. Havelock, Attorney General, Juneau, Seaborn J. Buckalew, Jr., District Attorney, and Charles M. Merriner, Assistant District Attorney, Anchorage, for Appellee.

Before: Boney, Chief Justice, Connor and Erwin, Justices [Rabinowitz, Justice, dissenting in part, concurring in part, and Boochever, Justice, not participating].

BONEY, Chief Justice: On February 16, 1970, the Polar Bar in Anchorage was burglarized, and a small safe weighing approximately 200 pounds was taken from the back room.

Early the following morning the Anchorage Police Depart-

ment received word from the Alaska State Troopers that a safe had been discovered along a little-used side road off the Glenn Highway, about 26 miles from Anchorage. Local residents had found the safe lying on its side in brush approximately 100 feet off the main road. The dial and handle were broken and the bottom of the safe had been pried open.

The State Troopers indicated that the discovery had been reported by Jess Straight, whose home was near the site of the discovery. At trial, Straight's stepson, a juvenile on probation for burglary, testified that he, his stepfather, and his uncle first viewed the safe at about 5:00 p.m. on February 16. The juvenile told the officers that at about noon the same day he had seen two black men standing alongside a late model metallic blue Chevrolet sedan at the same location. He approached the shorter of the two men and asked if they needed any help. He identified this man as blacks, mustachioed, wearing a black-brown mackinaw, and carrying a crowbar. Approximately 15 minutes later, the youth again observed the two men and the automobile at the site.

After receiving this report, Anchorage Police Investigator George E. Weaver canvassed the automobile rental companies in the area. He learned that Airway Rent-A-Car had rented a 1969 metallic blue Chevrolet Impala to Joshuaway Davis on Feburary 11, and that Davis had returned shortly after noon on February 16 to extend his rental contract. The Rent-A-Car agent said that Davis had paid an additional $50 from a large roll of bills and two rolls of quarters.

Investigator Weaver then asked the juvenile witness if he would come down to the police station in Anchorage to look at some pictures. The youth studied five pictures of black men for approximately 30 seconds, during which time Investigator Weaver went about other business and did not say anything or show any interest in the inspection. The juvenile then identified Joshuaway Davis as the man to whom he had spoken and Andrew J. Leonard as the other man he had seen near his home. Later the Rent-A-Car agent also selected the picture of Davis from among the five photographs.

On Feburary 18, Investigator Weaver presented an affidavit before a district judge requesting the issuance of a warrant for the search of both the residence of Joshuaway Davis and the rented car in his possession. The affidavit recited that the affiant was competent to testify; that the bar had been burglarized

and the safe stolen; that the named juvenile had observed the two black men near his home at approximately noon the same day; that he had spoken to the shorter man and had observed that this man was wearing a brown and black mackinaw type jacket and carrying a crowbar; that the youth had returned to the area at approximately 5:00 p.m. and had observed the safe; that dust, fibers and markings had convinced the affiant that the safe was the one burglarized from the Polar Bar; that further investigation had disclosed that a 1969 metallic blue Chevrolet had been rented to Joshuaway Davis on February 11; that both the Airways Rent-A-Car agent and the youthful witness at the scene had selected the picture of Joshuaway Davis from among the five mustachioed blacks; and that shortly after noon on February 16, the person identified as Joshuaway Davis had extended his rental agreement and had paid an additional $50 from a large roll of bills and two rolls of quarters. The affiant then stated his belief that the premises and the automobile contained specified items of evidence as well as "other evidence" of the crime. Without further hearings or considerations beyond the affidavit, the district judge issued search warrants for the premises and the automobile.

I

Davis first argues that the affidavit of Investigator Weaver did not provide probable cause for the issuance of the warrants because they contain only conclusory statements that a crime had been committed, and because the information given the judge was not the first-hand knowledge of the affiant. We cannot agree with either contention.

In determining whether supportive evidence of a crime exists, the question to be asked is whether the issuing judge was provided sufficient evidence to make an independent finding of probable cause for the issuance of the warrants. The United States Supreme Court has suggested that in making this determination on appeal "great deference" be given the findings of the issuing judge, that he not be "confined by niggardly limitations," and that "probability" rather than proof be the standard for probable cause.[1]

Applying these standards of review, we cannot agree with Davis that the affidavit contained only the conclusory asser-

[1] *Spinelli* v. *United States*, 393 U.S. 410, 419, 21 L. Ed. 2d 637, 645 (1969) (citations omitted).

tion that the Polar Bar had been burglarized. Investigator Weaver averred that his own investigation "revealed that the safe above described was the one stolen from the Polar Bar." Such a statement enabled the district judge to conclude without inferring undisclosed facts that the affiant had personal knowledge of the stolen safe. There is no informant hearsay connected with the actual commission of the burglary. The scene of the crime was investigated by an officer under the direct supervision of the affiant. The police work described in the affidavit indicates that the police had already invested a substantial number of man hours on the assumption that a crime had been committed. The discovery of the broken safe is itself independently suggestive of a crime.

Investigator Weaver's statements are not mere assertions of belief or suspicions that a crime had been committed. They are facts and circumstances which cumulatively go far toward establishing the existence of a burglary, and toward providing the basis for the judge's independent determination that probable cause existed.

Moreover, a substantial portion of the information given to the district judge was the personal work product of the affiant. He averred that he personally had interviewed the juvenile, and that his own investigation had corroborated the youthful witness' statement that Davis was in possession of a metallic blue Chevrolet shortly after the burglary. He further averred that both the juvenile and the rental agent had selected Davis' photograph from a group of five photographs of adult black males wearing mustaches. The nature and quantity of supportive evidence in the affidavit readily distinguish the present case from the case upon which Davis relies, *Giordenello* v. *United States*,[2] where the affidavit contained only conclusory statements.

Davis next contends that the information obtained from the witnesses and alleged in the affidavit was hearsay, and that the affidavit neither alleges the reliability of those informants, nor independently corroborates their statements as required by *Aguilar* v. *Texas* [3] and *Jones* v. *United States*.[4]

While reliance upon hearsay does not change the standards of probable cause, it does add to the burden which must be met

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[2] 357 U.S. 480, 2 L. Ed. 2d 1403 (1958).
[3] 378 U.S. 108, 12 L. Ed. 2d 723 (1964).
[4] 362 U.S. 257, 4 L. Ed. 2d 697 (1960).

by the affiant. The information must be based on the personal observations of the informant, and not his suspicions, beliefs, or some form of double hearsay.[5] Absent any affirmative allegation of personal knowledge of the informant in the affidavit, the facts supplied must be so detailed as to support an inference of personal knowledge.[6] In addition, the judge "must be informed of some of the underlying circumstances * * * from which the [affiant] concluded that the informant * * * was 'credible' or his information 'reliable.'"[7] This reliability might be established by demonstrating past reliability,[8] by independent corroboration of incriminating facts by the police,[9] or through the personal identity and involvement of the person giving the information.[10]

In the instant case, both statements by the witnesses were independently corroborated by the preliminary police investigation. The officers determined that the man whom the juvenile witness had described had rented a car which the youth had also described. The witness later identified the picture of the man whose name the police had obtained from another source. Similarly, the automobile rental agent described the man and identified a photograph. Each independent identification strengthened the other in the sense of making each witness' information more reliable, and enhancing the probability that his information was credible.

Also, the hearsay evidence in the present case can be viewed less suspiciously because it does not offer information about a crime per se, nor does it establish the existence of the crime. It is informative rather than accusative; supplemental rather than essential. The police were independently aware of the

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[5] *Spinelli* v. *United States*, 393 U.S. 410, 416, 21 L. Ed. 2d 637, 644 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 113, 12 L. Ed. 2d 723, 728 (1964); *United States* v. *Roth*, 391 F. 2d 507 (7th Cir. 1967).

[6] *Spinelli* v. *United States*, 393 U.S. 410, 416, 21 L. Ed. 2d 637, 644 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 113, 12 L. Ed. 2d 723, 728 (1964); *United States* v. *Davis*, 402 F. 2d 171 (7th Cir. 1968).

[7] *Aguilar* v. *Texas*, 378 U.S. 108, 114–15, 12 L. Ed. 2d 723, 729 (1964) (citations omitted). *See also United States* v. *Harris*, — U.S. —, 29 L. Ed. 2d 723 (1971).

[8] *E.g.*, *Smith* v. *United States*, 358 F. 2d 833, 835 (D.C. Cir. 1966).

[9] *Spinelli* v. *United States*, 393 U.S. 410, 417–18, 21 L. Ed. 2d 637, 644 (1969).

[10] *Pendergrast* v. *United States*, 416 F. 2d 776, 785 (D.C. —), *cert. denied*, 396 U.S. 926, 23 L. Ed. 2d 243 (1969); *McCreary* v. *Sigler*, 406 F. 2d 1264, 1269 (8th Cir. 1969).

commission of a crime. Nothing in the hearsay accused Davis of having committed that crime. The connection between the hearsay descriptions and identifications, and the fact of a crime, is the result of the investigator's deductive reasoning. This reasoning is clearly set forth in the affidavit for the independent scrutiny of the issuing judge.

For these reasons we cannot find that the affidavit for the warrants was deficient.

The search warrants obtained from the above affidavit were executed that same day, February 18, 1970. Although Davis contends in a single sentence that the search was conducted in bad faith, there is no evidence to support that claim. The officers knocked at the door for some time. When no one answered they went across the alley to get a key from the landlord. As they were unlocking the door, Davis opened it from the inside. They showed their warrants, arrested Davis and began the search. The car was towed to the police station in order to conduct a more thorough search for safe insulation fibers and other evidence. There is no evidence or testimony indicating that the officers abused their authority in conducting the search.

Davis argues further, however, that the warrants were not sufficiently particular to justify the seizure of all the items which were involved. The automobile warrant authorized the seizure of

> certain property described as evidence of the burglary and larceny * * * including fibers matching those found at the crime scene, debris matching that found on the safe held as evidence in this case, paint flecks matching paint on the safe, tools and other evidence relating to the commission of the above described offenses * * *.

The premises warrant authorized the seizure of

> certain property described as evidence of the crime of burglary and grand larceny * * * including a cruved [sic] handled crowbar, a brown mackinaw, boots or shoes with safe insulation fibers imbedded therein, and other evidence of the commission of the crime above described * * *.

Noting that the warrants authorized the seizure of "other evidence," Davis contends that both warrants fail to describe particularly the property to be seized, and thus must fail as general warrants.

We cannot agree that this language gives the executing officer "blanket authority" and leaves to him a "subjective determination" of the scope and intensity of the search. We consider that the addition of the "other evidence" language reaffirms rather than broadens the scope of the search authorized by the listed and particularized items.

Stanford v. *Texas*,[11] cited by Davis, is readily distinguishable. That case turned largely on first amendment considerations. In the instant case, no published materials have been seized, nor ideas repressed. No first amendment threats are posed. Similarly, *Rice* v. *United States*[12] is distinguishable from the instant case. In that case the warrant gave absolutely no description of the property to be seized. The reviewing court held it defective for failing to describe "even in the most general way" the items subject to seizure.

Davis also argues that the warrants failed to meet the test announced in *Bell* v. *State*, where we held that:

> [A]n officer may seize evidence of a crime even though such property is not particularly described in the search warrant when the objects discovered and seized are reasonably related to the offense in question, when the searching officer at the time of the seizure has a reasonable basis for drawing a connection between the observed objects and the crime which furnished the basis for the search warrant, and the discovery of such property is made in the course of a good faith search conducted within the authorized perimeters of the search warrant.[13]

A perusal of the inventoried items[14] seized in the present case convinces us that the evidence seized was all within the limits

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[11] 379 U.S. 476, 13 L. Ed. 2d 431 (1965).

[12] 24 F. 2d 479, 480 (1st Cir. 1928).

[13] 482 P. 2d 854, 860 (Alaska 1971) (footnote omitted).

[14] The inventoried items from the two warrants were: one vial suspected marijuana; twenty-one dollars currency; a car contract and receipt; a cigarette holder; a packet of checks and driver's license blanks; a folder of miscellaneous identification; a pair of tan boots; a knotted silk stocking; a bag of white substance; a pair of brown trousers; a pair of light tan trousers; two pairs of brown coveralls; a Colt .45 automatic revolver with no serial number or clip; a plaid overcoat; four bags of vacuum cleaner debris; a piece of rope; four bags of paint samples; three floor mats; one tire iron; and three pieces of cardboard.

of our ruling in *Bell*.[15] All of the items used at trial were either particularly described in the warrants or were sufficiently related to the crime, the listed evidence, and the purpose of the search to satisfy the requirements of *Bell*.

II

Davis next contends that he was denied his right to counsel during a lineup identification, evidence of which was admitted at trial. Davis further contends that his in-court identification was thereby tainted.

At approximately 10:00 a.m. on February 19, 1970, Assistant District Attorney Richard R. Felton contacted Herbert D. Soll of the Public Defender Agency to inform him that a lineup would be held that morning. While the Public Defender Agency was representing both Davis and Leonard, the other suspect, Soll was not assigned to either suspect. He was filling in at the time and claimed at trial that his recollection of what transpired was hazy because of his limited involvement in the cases.

There is conflict in the court testimony concerning whether Soll was representing both Davis and Leonard during the lineup, or whether he was representing only Leonard. According to Soll's testimony, only Leonard had requested the lineup. While confirming that Davis had been brought into the prelineup interview with Leonard, Soll testified repeatedly that he could not recall ever being aware that Davis was going to participate in the actual lineup.

Because the police had some difficulty finding mustachioed blacks for the witnesses to view with Leonard and Davis, the lineup was delayed until about noon. Soll had a prior engagement and was compelled to leave before the other subjects could be assembled. When Felton said that they would not proceed unless counsel was present, Soll agreed that the lineup which had been requested by Leonard could be held without him, and said he would send someone from his office to observe it. At no time did Soll see any of the participants in the lineup other than the two suspects, Leonard and Davis.

A college student-investigator attended the lineup for the Public Defender Agency. He had been working for the Public Defender Agency for about two months. He was a sociology

[15] We need not decide, for those items used at the burglary trial, whether or not the holding of *Bell* represents the upper limit on permissable seizures.

major at Alaska Methodist University and had no prior legal training. Soll testified that he instructed the student in the kinds of things to watch during the lineup. While certain that these instructions were given with respect to Leonard, Soll again testified that he could not recall that he was even aware that Davis was going to participate in the lineup.

The trial judge made no specific finding on the question of whether Davis was represented by counsel during the lineup. He merely determined

> that in spite of U.S. versus Wade that the defendant's rights were not prejudiced, that the lineup as held by the police was proper; the evidence was shown that it was proper, that Mr. Soll, although not representing either defendant, was there, although he may have on recollection believe [sic] that he was only there because of the other defendant, Leonard, Mr. Felton indicated that he was aware of both defendants and there was nothing to show that the lineup wasn't proper. I—I'm not following U.S. versus Wade technically or fully but I think the Supreme Court of the United States has receded somewhat from that very strict position.

We cannot agree with the ruling of the trial judge that the rights afforded a suspect by *United States* v. *Wade*[16] can be discounted so easily. In the companion case, *Gilbert* v. *California*,[17] the same right to counsel at lineup identifications was made applicable to the states through the fourteenth amendment.

However, we need not decide whether Davis was represented by counsel during the lineup because we find that the courtroom identification derived from a source independent of that lineup, and that the introduction of the lineup identification at trial was harmless error.

In *Wade* the Supreme Court said that the courtroom identification cannot be excluded

> without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.[18]

[16] 388 U.S. 218, 18 L. Ed. 2d 1149 (1967).
[17] 388 U.S. 263, 18 L. Ed. 2d 1178 (1967).
[18] 388 U.S. 218, 240, 18 L. Ed. 2d 1149, 1164 (1967).

The test to be applied is the same as that announced in *Wong Sun* v. *United States*:[19] whether "'the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[20] The *Wade* court then lists a number of factors to be considered in applying this test.[21]

In determining whether or not the courtroom identification was independent of the lineup, we must be mindful of the distinction between the "independent source" exception to the *Wade-Gilbert* right to counsel, and the "totality of circumstances" test which the same court applied in *Stovall* v. *Denno*[22] to pre-*Wade-Gilbert* lineups.

We feel compelled to draw a clear distinction between the two approaches because in this case the trial judge appears to have applied a "totality of circumstances" approach,[23] and because a number of other jurisdictions have obfuscated the "distinction between the protection offered by *Wade-Gilbert* right to counsel and the totality-of-circumstances criteria against which the courts measure a violation of due process in identification confrontations."[24] In evaluating evidence used at trial from a lineup without counsel, we are not merely concerned with the fundamental fairness of that lineup. We are also concerned with the need for counsel to be present in order to evaluate the circumstances and prepare his argument at trial sufficiently to provide the defendant with his sixth amendment

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[19] 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

[20] *United States* v. *Wade*, 388 U.S. at 241, 18 L. Ed. 2d at 1165, *quoting* *Wong Sun* v. *United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963), *quoting* Maguire, *Evidence of Guilt* 221 (1959).

[21] Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant, to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

388 U.S. at 241, 18 L. Ed 2d at 1165 (footnote omitted).

[22] 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206 (1967).

[23] See the quoted passage from the trial transcript in text accompanying note 16 *supra*.

[24] Note, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. Chi. L. Rev. 830, 833 n. 14 (1969).

right to confront identifying witnesses.[35] The fact that the Court did not make *Wade-Gilbert* retroactive suggests that they envisioned a change from prior identification requirements and protections. While the Court in *Stovall* said that it would consider the totality of circumstances surrounding the identification,[36] the same Court in *Wade* said that the circumstances and conduct of the lineup was only one of at least seven factors to be considered in applying the independent origin test.[37]

We note in the instant case that the juvenile witness had a prior opportunity to observe and talk with Davis at the Glenn Highway location, that he identified a picture of Davis prior to the lineup, and that there was no significant lapse of time between the alleged act and the lineup identification such that the lineup would have significantly refreshed and influenced his courtroom identification. We further note that there is no discrepancy between the pre-lineup description by the juvenile and the appearance of Davis. The youth had not erroneously identified any other person prior to the lineup, nor had he failed to identify Davis on any prior occasion. The earlier identifications coupled with the absence of such negative factors persuade us that the courtroom identification was independent of the lineup.

We also conclude that the use of the lineup evidence was harmless error. In *Love* v. *State* [38] we adopted a harmless error test which focuses on the substantiality of the effects of the error.[39] However, we also recognized at the time that the United States Supreme Court had rejected a substantiality test in

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[35] In *Wade* the court noted: "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." 388 U.S. at 235, 18 L. Ed. 2d at 1162.

[36] 388 U.S. at 302, 18 L. Ed. 2d at 1206.

[37] 388 U.S. at 241, 18 L. Ed. 2d at 1165. See note 21 *supra* for a listing of the particular factors to be considered.

[38] 457 P. 2d 622 (Alaska 1969).

[39] We stated that test to be the same as that adopted in *Kotteakos* v. *United States*, 328 U.S. 750, 90 L. Ed. 2d 1557 (1946), "that the judgment was not substantially swayed by the error." 457 P. 2d at 631. In *Roberts* v. *State*, 458 P. 2d 340, 342 (Alaska 1969), that test was stated as whether the error "appreciably affect[ed] the jury's determination of the appellant's guilt."

Chapman v. *California* [30] for all cases involving federal constitutional protections. Such is the case before us today; in order to hold harmless any error in the use of the lineup evidence, we "must be able to declare a belief that it was harmless beyond a reasonable doubt." [31]

In the instant case, the identification of Davis was crucial to the prosecution's case. However, we have already determined that the identification was independently established by the juvenile's encounter on the road, and by the later photographic identification. Moreover, it does not appear that the prosecution placed much emphasis on the lineup identification at trial. While a picture of the lineup was identified by the youth on the witness stand, that picture was never introduced as evidence. On the other hand, Davis' own counsel did dwell, in front of the jury, on the point of whether the youth's courtroom identification was independent of the lineup identification. Finally, the trial judge made no comment on any of the identification evidence.

Based on the independence of the identification evidence and the insignificant part the lineup played in the trial, we are convinced that the little exposure the jury had to the fact of the lineup was overshadowed by the other identification evidence, and had no probable effect in establishing the prosecution's case before the jury. Hence, we are able to declare that we believe beyond a reasonable doubt that any error was harmless error.

III

Davis next contends that the court erred in denying his motion for judgment of acquittal at the end of the prosecution's case. He argues that there was no evidence connecting him to the crimes of burglary and larceny; that at best he was placed at the scene of the later discovery of the safe; and that he was never seen in possession of the safe. Davis' motion at trial was based on the contention that mere circumstantial evidence of possession is insufficient to go to the jury or to sustain a conviction of burglary or larceny.

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[30] 386 U.S. 18, 17 L. Ed. 2d 705 (1967).

[31] *Chapman* v. *California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967); *accord*, *Bargas* v. *State*, 489 P. 2d 130, 133 (Alaska 1971); *Spaulding* v. *State*, 481 P. 2d 389, 392 (Alaska 1971); *Fresneda* v. *State*, 458 P. 2d 134, 145 (Alaska 1969); *Robert* v. *City of Fairbanks*, 456 P. 2d 470, 477–478 (Alaska 1969); *Thessen* v. *State*, 454 P. 2d 341, 350 (Alaska 1969).

It is well settled in this court that when an appellant challenges the sufficiency of the evidence supporting a verdict and judgment

> the judge must take the view of the evidence and the inferences therefrom most favorable to the state. If he determines that fair minded men in the exercise of reasonable judgment could differ on the question of whether guilt has been established beyond a reasonable doubt, then he must submit the case to the jury.[31]

In order to determine whether fair-minded men in the exercise of reasonable judgment could differ on the question of guilt, it is necessary to trace the path of reasoning which any fair-minded man must traverse to arrive at the conclusion of guilt of larceny and burglary beyond a reasonable doubt.

There is no direct evidence that Davis was at any time in possession of the safe. On the other hand, viewing the evidence "most favorable to the state," the circumstantial evidence of possession is quite persuasive. Davis was seen at the site of the broken safe with a crowbar in hand, and the fibers in the trunk of his car were the same substance which insulated the stolen safe. If this were an appeal from a charge and conviction for possession of stolen goods, we would have no difficulty concluding that this case "illustrates the high degree of certainty which can be achieved through circumstantial evidence," [32] and that because fair-minded men of reasonable judgment could differ on the question of guilt, the facts should be submitted to the jury.

But in this case it is not sufficient to infer possession alone in order to convict. The defendant is charged with larceny and burglary. The fair-minded men exercising reasonable judgment must infer the crimes of larceny and burglary from the inference of possession. Hence, this is a case which requires the pyramiding of an inference of theft upon an inference of possession. In the past we have cautioned that "building inference upon inference without adequate data" would present the very grave danger of a criminal conviction founded on speculation.[33] The facts of the instant case require a cautious analysis.

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[31] *Bush* v. *State*, 397 P. 2d 616, 618 (Alaska 1964) (footnote omitted). *Accord*, *Jordan* v. *State*, 481 P. 2d 383, 387 (Alaska 1971); *Allen* v. *State*, 420 P. 2d 465, 467 (Alaska 1966); *See Tarnef* v. *State*, 492 P. 2d 109, 116–117 (Alaska 1971).

[32] *Jordan* v. *State*, 481 P. 2d 383, 387 (Alaska 1971).

[33] *Davis* v. *State*, 369 P. 2d 879, 882–83 (Alaska 1962).

The evidence of possession of the safe in the instant case, though circumstantial, is comparable in persuasiveness to any direct evidence short of the defendant being caught with the safe in hand. Because the evidence of possession is so persuasive, we cannot conclude that the present case demands that double level of inference "without adequate data" which would present a danger of conviction founded on speculation. Thus we hold that the only significant inference required by the jury was the inference of burglary and larceny from possession.

Wigmore suggests that what is minimally required to permit an inference of theft from possession is that the possession be exclusive, unexplained, and fairly close in time to the commission of the crime.[25] The majority of jurisdictions which follow this rule have held that the questions of whether the possession was sufficiently recent and sufficiently exclusive to justify an inference of guilt are questions of fact for the jury.[26] Thus, according to our standard of sufficiency of the evidence, the judge should rule on the question of exclusivity as a matter of law only when the evidence that possession was not exclusive is so persuasive that fair-minded men exercising reasonable judgment could not differ with that conclusion.

Davis relies primarily upon *Davis* v. *State*,[27] where we held that where all the evidence of guilt is circumstantial, it is incumbent upon the state to produce evidence of circumstances excluding every reasonable hypothesis but that of guilt.[28] Davis argues that the evidence showing the presence, at the site where the safe was discovered, of another man whose role in the criminal act was never positively determined cast doubt upon the exclusivity of possession sufficient to require a granting of his motion for judgment or acquittal.

We cannot agree with Davis. The language in *Davis* v. *State* upon which he relies was specifically rejected in *Jordan* v. *State*.[29] We conclude that fair-minded men exercising reasonable judgment could conclude that Davis had the necessary exclusivity of control.

We hold, therefore, that the trial judge did not err in refusing to grant the motion for judgment of acquittal.

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[25] IX J. Wigmore, Evidence § 2513, at 422 (3d ed. 1940).

[26] *E.g.*, *State* v. *Downing*, 205 P. 2d 141, 145 (Ore. 1949). *See generally*, IX J. Wigmore, Evidence § 2513, at 422 (3d ed. 1940).

[27] 369 P. 2d 879 (Alaska 1962).

[28] *Id.* at 882.

[29] 481 P. 2d 383, 386–387 (Alaska 1971).

IV

Davis next urges that the trial judge erred in not permitting the defendant to cross-examine the juvenile witness concerning the nature of his prior juvenile record. Recognising that the majority of cases on impeachment of a witness by a juvenile record is against him,[40] the appellant wishes to distinguish his case. He claims not to be interested in impeaching the juvenile, but rather desires to show bias, prejudice or motive in that the witness was under pressure to shift suspicion from himself to another.

In *Whitton* v. *State*[41] the trial court refused to permit cross-examination of a witness to determine whether he was motivated to testify for the state by an expectation of immunity for his own criminal acts. We held that "when the primary objective of cross-examination is to establish bias, the fact that it may also be shown that the witness committed wrongful acts does not violate Civil Rule 43(g)(11)[b]."[42] We recognised that because the human tendency toward bias is so common, "reasonable latitude must be allowed in the cross-examination of a witness * * *."[43]

On the other hand the basis for the trial judge's decision was Rule 23 of the Alaska Rules of Children's Procedure,[44] which provides:

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[40] *E.G., In re* Nash, 393 P. 2d 405 (Cal. 1964) (juvenile record not admissible to impeach prosecuting witness absent special circumstances as where witness is an exploited prostitute in trial charging pimping and pandering); *Martinez* v. *Avila*, 415 P. 2d 59 (N.M. 1966) (juvenile record not to be elicited even where law permits cross-examination concerning "acts of misconduct" for impeachment); *State* v. *Wilson*, 465 P. 2d 413 (Wash. 1970) (juvenile record inadmissible because not "crime" as rules of evidence required for impeachment). *See generally*, cases cited in IIIA J. Wigmore, Evidence § 980, at n. 6 (rev. ed. 1970); C. McCormick, Handbook of the Law of Evidence § 43, at n. 16 (1954); Annot. 147 A.L.R. 443, 446 (1943). *But see State* v. *Searle*, 239 P. 2d 995 (Mont. 1952) (statement in juvenile proceeding inconsistent with statement as prosecuting witness admissible without violation of statutory ban of use "against the child").

[41] 479 P. 2d 302 (Alaska 1970).

[42] *Id.* at 317 (footnote omitted).

[43] *Id.*

[44] That rule is cross-referenced to AS 47.10.080(g) which in part provides: "The commitment and placement of a child and evidence given in the court are not admissible as evidence *against the minor* in a subsequent case or proceedings in any other court * * *." [Emphasis added.]

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a pre-sentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

In support of his argument against the lower court interpretation of Rule 23, Davis cites Wigmore:

> A judgment, in finding, or proceeding of deliquency in a juvenile court is by modern statutes forbidden to be used 'against the child' in any other court. It would be a blunder of policy to construe these statutes as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as witness in another court."

Wigmore illustrates his point with an example of a delinquent girl with nymphomaniac tendencies who testifies as prosecutrix in a case of rape or indecent liberties.

The instant case would appear to place the interest of protecting the anonymity of a juvenile transgressor in conflict with the interest of affording the defendant an adequate opportunity to confront adverse witnesses. However, while the judge did not permit questions directly disclosing the fact that the juvenile had a prior record, our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the juvenile in considerable detail concerning the possibility of bias or motive. Council alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension. The juvenile responded that he felt no anxiety or apprehension about the safe being discovered near his home. While this denial was possibly self-serving, the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the juvenile and pass on his credibility.

Given these indirect references, we cannot find error in the refusal to permit the introduction of direct evidence of the juvenile record.

" IIIA J. Wigmore, Evidence § 980, at 834 (rev. 3d. 1970). [Emphasis and cross-reference omitted.]

V

From a separate conviction, Davis brings another appeal which we have consolidated for purposes of decision.

Among those items seized during the search of the defendant's house was a Colt .45 automatic found under a dresser in one of the bedrooms. No clip was discovered but bullets were located in the closet of this same room. Davis was indicted for being a felon in possession of a concealable firearm, and was found guilty in a separate trial on that issue.

Davis first argues that the trial court erred in denying his motion to suppress the gun as illegally seized. He contends that the gun fails to come within the limits of *Bell* v. *State*.[46] We agree with Davis that the gun was not "reasonably related" to the burglary which was the crime for which the search was conducted. However, our inquiry does not end with such a conclusion. The general rule is that in conducting a search pursuant to a valid warrant only the items particularly described may be seized.[47] There are, however, exceptions to that rule. Our holding in *Bell* constitutes such an exception for it authorizes the seizure of an object not listed in the warrant but reasonably related to the offense in question when the officer has a reasonable basis for relating the object to that crime.[48] By way of dicta in *Bell*, we recognized other exceptions to the general rule requiring particularity.[49] Among those exceptions was one which authorizes[50] an officer who is conducting a good faith search pursuant to a valid warrant to seize objects in plain view[51] which he has a reasonable basis to believe are related to another crime which he has probable cause to believe is being committed in his presence.[52]

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[46] 462 P. 2d 854, 860 (1970). See discussion in accompanying text and notes 13–15 *supra*.

[47] U.S. Const. amend. IV; Alaska Const. art. I, § 14.

[48] *Accord, Gurleski* v. *United States*, 405 F. 2d 253, 257–260 (5th Cir. 1968), *cert. denied*, 395 U.S. 981, 23 L. Ed. 2d 769 (1969).

[49] 462 P. 2d at 859.

[50] The scope of the search authorized by the search warrant may not be exceeded.

[51] As was stated in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, 29 L. Ed. 2d 564, 582 (1971): "An example of the applicability of the plain view doctrine is the situation in which the police have a warrant to search a given area for specific objects, and in the course of the search come across some other article of incriminating character."

[52] *Aron* v. *United States*, 382 F. 2d 965, 973–974 (8th Cir. 1967); *Seymour* v. *United States*, 369 F. 2d 825, 827 (10th Cir. 1966), *cert. denied*, 386 U.S.

Footnote continued on next page.

Investigator Weaver testified at trial that he had found and seized the gun, and that he was aware of Davis' being a previously convicted felon. The gun had no serial number. Finding a gun with no serial number in the bedroom of the apartment of a man he knew to be a convicted felon gave the searching officer a reasonable basis to believe that the crime of felon in possession, to which the gun was reasonably related, was being committed in his presence. We therefore conclude that the trial court did not err in denying Davis' motion to suppress the gun.

Davis next argues that his possession of the gun was not sufficiently established. Davis' landlord testified at the trial that Davis was living in the apartment occasionally with his wife, occasionally with another woman, and that Davis received numerous visitors. He further testified that a woman who had been living there for approximately two months moved out about the time that Davis was arrested. He said that the woman was the type of person whom he would expect to carry a gun. Davis then testified that the woman had lived in the room where the gun was found, and that on one occasion he had seen her with a gun.

Davis argues that the standard of exclusivity required by *Davis* v. *State* [43] should also be required before there is evidence sufficient to send a charge of felon in possession to the jury. However guilt of this latter crime does not require actual possession. "Custody" or "control" [44] is sufficient.[45]

Davis also argues that because no clip was found for the au-

Footnote continued from previous page.

967, 18 L. Ed. 239 (1967); *Porter* v. *United States*, 335 F. 2d 602, 607-608 (9th Cir. 1964), *cert. denied*, 379 U.S. 983, 13 L. Ed. 2d 574 (1965); *United States* v. *Bisner*, 297 F. 2d 595, 597 (6th Cir.), *cert. denied*, 369 U.S. 830, 8 L. Ed. 2d 17 (1962). *See also United States* v. *De Pugh*, 452 F. 2d 915, 921 (10th Cir. 1971); *United States* v. *Henkel*, 451 F. 2d 777, 780-781 (3d Cir. 1971); *United States* v. *Honore*, 450 F. 2d 31, 33 (9th Cir. 1971); *Anglin* v. *Director*, Patuxent Institution, 439 F. 2d 1342, 1346-1348 (4th Cir.), *cert denied*, —— U.S. ——, 30 L. Ed. 2d 262 (1971); *Johnson* v. *United States*, 296 F. 2d 539, 540 (D.C. Cir. 1961), *cert. denied*, 375 U.S. 888, 11 L. Ed. 2d 118 (1963); *State* v. *Johnson*, 10 Crim. L. Rptr. 2388 (Conn. Jan. 25, 1972). *Contra*, *United States* v. *Dzialak*, 441 F. 2d 212, 216-217 (2d Cir.), *cert denied*, —— U.S. ——, 30 L. Ed. 2d 165 (1971).

[43] 369 P. 2d 879 (Alaska 1962).

[44] Knowledge is a prerequisite to possession, control or custody. *Egner* v. *State*, Op. No. 784 (Alaska April 17, 1972). Davis raises no contention that he lacked the necessary knowledge.

[45] AS 11.55.080. *Cf.*, *State* v. *Porter*, 443 P. 2d 360, 363 (Kan.), *cert. denied*, 393 U.S. 1108, 21 L. Ed. 2d 805 (1968); *People* v. *Britton*, 118 N.Y.S. 989, 993 (Sup. Ct. 1909), "If physical possession was required, the words 'custody,

tomatic revolver, it could not be used and therefore cannot be called a weapon under the law. We take judicial note of the fact that the absence of a clip is not a mechanical defect rendering the pistol inoperable. The weapon could still be single-loaded with the bullets that were close at hand.

Little more need be said than that case law almost unanimously supports the propositions that conviction of "felon in possession" may be based on circumstantial evidence of possession or custody,[56] and that a revolver need not be fully assembled or immediately capable of firing in order to qualify as a weapon.[57] The purpose of the felon in possession statute is to prevent the concealment and use of firearms in violent crime. It is immaterial whether the gun is loaded and ready for immediate use. If such were the requirement, the law could easily be circumvented by maintaining custody of an unloaded gun while hiding the bullets until needed.[58]

We find no reversible error in the rulings of the court below, and we affirm the verdicts.

RABINOWITZ, Justice, dissenting in part, concurring in part.

I concur in the court's holding that Davis' conviction of the crime of felon in possession should be affirmed. On the other hand, I cannot agree that Davis' convictions of the crimes of burglary not in a dwelling and grand larceny can be upheld. For my view, the trial court erred in granting the prosecution's motion for a protective order which had the impact of precluding Davis' counsel from effectively cross-examining a key juvenile witness for the government.

Given Davis' constitutional rights, under both the Alaska and Federal Constitutions to confront adverse witnesses against him and the quality of the prosecution's totally circumstantial case against Davis, the trial court's erroneous curtailment of cross-examination of this crucial juvenile witness cannot be characterized as harmless error under either *Love* v. *State*, 457, P. 2d 622 (Alaska 1969), or *Chapman* v. *California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967), differing standards for determination of harmless error.

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or control' are meaningless, and plainly those words are not used synonymously with 'possession.' * * * One may * * * exercise control over what is not in his physical possession * * *."

[56] *E.g.*, *State* v. *Clipston*, 473 P. 2d 682, 687 (Ore. App. 1970).

[57] *People* v. *Ekberg*, 211 P. 2d 316 (Cal. App.), *cert. denied*, 339 U.S. 969, 94 L. Ed. 1377 (1949).

[58] *See State* v. *Quail*, 92 A. 859 (Del. Ct. Gen. Sess. 1914).

In the case at bar, counsel for Davis sought to show on cross-examination that at the time of trial the state's juvenile witness was still under probation supervision for the crime of burglary. Counsel for Davis wanted to elicit this fact for the purpose of showing the witness's bias as well as his motive in giving testimony for the prosecution. In regard to the cross-examination of a witness as to his bias or motive, in *RLR* v. *State*, 487 P. 2d 27, 44 (Alaska 1971), we said that:

> "[G]reat liberality should be given defense counsel in cross-examination of a prosecution witness with respect to his motive for testifying." Cross-examination to show bias because of expectation of immunity from prosecution is one of the safeguards essential to a fair trial, and undue limitation on such cross-examination is reversible error without any need for a showing of prejudice (footnotes omitted).[39]

In the case at bar, the majority believes that Davis' constitutional right of confrontation was satisfied because his counsel "alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension." In my view, this falls far short of the confrontation rights guaranteed Davis. Vague speculations concerning ulterior motives and the possibility that the juvenile witness's identification of Davis arose from apprehension are hardly adequate substitutes for bringing home to the jury the fact that the juvenile witness was on probation for burglary at the time he testified. The right of confrontation required that Davis be permitted to show that the witness was on probation for burglary and also encompassed the right to inquire into the circumstances of the witness's relations with the police.

I find the majority's reliance upon Rule 23, Alaska Rules of Children's Procedure, inapposite here. The accused's fundamental right to confront adverse witnesses against him outweighs any interest in protecting a juvenile witness from disclosure of his prior adjudication of delinquency and from dis-

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[39] *See also Doe* v. *State*, 487 P. 2d 47, 58 (Alaska 1971) where we said that the right of liberal cross-examination of a witness as to his bias is well established. In *Whitton* v. *State*, 479 P. 2d 302, 317 (Alaska 1970), in recognizing that reasonable latitude must be allowed in the cross-examination of a witness, we said that "when the primary objective of cross-examination is to establish bias, the fact that it may also be shown that the witness committed wrongful acts does not violate Civil Rule 43(g)(11)[b]."

closure of the disposition order.[9] In light of this court's stated preference for liberality of cross-examination of a prosecution witness with respect to his motive or bias in testifying, I reach the conclusion that in the case at bar Davis' rights of confrontation were improperly curtailed.[11] I therefore conclude that Davis must be given a new trial as to the separate offenses of burglary not in a dwelling and grand larceny.

Supreme Court of the United States

No. 72–5794

JOSHAWAY DAVIS, PETITIONER

v.

ALASKA

On petition for writ of certiorari to the ..... Supreme Court of the State of Alaska.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted

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[9] Rule 23, Alaska Rules of Children's Procedure, provides: "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate."

Rule 23, Alaska Rules of Children's Procedure, is more expansive than its statutory counterpart. AS 47.10.080(g), which in part provides: "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court * * *."

As we said in *RLR* v. *State*, 487 P. 2d 27, 37 (Alaska 1971), "These social policy considerations [dictating anonymity in children's proceedings] are based on empirical propositions which may be false and have not been tested" (footnote omitted).

[11] I am in agreement with Professor Wigmore's view: "It would be a blunder of policy to construe these statutes [AS 47.10.080(g) and similar statutes] as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as a witness in another court."

IIIA J. Wigmore, *Evidence* § 980, at 834 (rev. ed. 1970).

limited to Question 1 presented by the petition which reads as follows:

1. Did the trial court err in not permitting cross-examination of chief identification witness Green concerning the nature of his juvenile record to bring before the jury the fact that Green was himself on probation for burglary at the time of the identification, thereby denying petitioner his Sixth Amendment right to confrontation?

FEBRUARY 20, 1973.

AMICUS CURIAE BRIEF

FILE COPY

6 1973

In the
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,
APPELLANT,

v.

ALASKA,
APPELLEE.

MOTION FOR LEAVE TO FILE A BRIEF FOR ARTHUR BEMBURY AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ARTHUR BEMBURY.

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Blanchard Press, Inc., Boston, Mass. — Law Printers

In the

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,

APPELLANT,

v.

ALASKA,

APPELLEE.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF ALASKA

MOTION FOR LEAVE TO FILE A BRIEF FOR ARTHUR BEMBURY AS AMICUS CURIAE

Arthur Bembury respectfully moves for leave to file a brief as *amicus curiae* in support of the appellant in this case. The consent of the attorney for the appellant has been obtained and filed with the Clerk. The consent of the Attorney General of Alaska was requested, but no final decision on this request has been received.

Mr. Bembury has been convicted of murder in the second degree and sentenced to imprisonment for life. An appeal from that conviction to the Supreme Judicial Court of Massachusetts is pending. As will more fully appear in Section I of the brief submitted herewith and in Appen-

dix A of the brief,[1] the direct interest of the *amicus* is that the disposition of this case will in all probability determine the result of his appeal.

While the petitioner in *Davis* v. *Alaska* raises the question of the use of juvenile records to show bias or interest on the part of a prosecution witness, the *amicus's* case involves the admissibility of juvenile records primarily to impeach the credibility of the key government witness in a case where credibilty was decisive, and only secondarily the admissibility of such records to show an interest. These two questions are obviously substantially similar and involve many of the same considerations. Moreover, the factual configuration in the *amicus's* case raises the question whether a prohibition on the use of juvenile records denied the defendant a fair trial.

Because the issues raised by the apellant and by the *amicus*, although virtually identical, have a slightly different focus, it is respectfully submitted that the brief of the *amicus* will enable the Court to properly consider all dimensions of the issue such that its opinion in this case will provide more guidance for the state and lower federal courts.

Respectfully submitted,

William P. Homans, Jr.
Thomas G. Shapiro
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45 School Street
Boston, Massachusetts 02108
Attorneys for
Arthur Bembury, Amicus

[1] The motion reproduced as Appendix A was submitted after a previous motion praying for leave to impeach the credibility of the witness by introduction of her juvenile records had been denied by the trial court.

In the

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,

APPELLANT,

v.

ALASKA,

APPELLEE.

BRIEF AMICUS CURIAE OF ARTHUR BEMBURY

Interest of Amicus

The *amicus*, Arthur Bembury, was convicted of murder in the second degree in June, 1971, and his appeal from that conviction is presently pending before the Supreme Judicial Court of Massachusetts.

A brief statement of the nature of his trial will indicate his interest as an *amicus*. The principal witness against the defendant was the 15-year-old daughter of the deceased and was the defendant's girlfriend until shortly prior to the alleged offense. She testified, *inter alia*, that she heard the defendant speaking with her mother (the deceased) in the vestibule of her home, her mother said, "go ahead and shoot," and she heard a shot. In short, she gave direct evidence, and the only direct evidence, that the defendant committed the murder. The defendant testified, denying

that he committed the offense. The relative credibility of the defendant and this witness was the main issue at the trial.

The defendant was not permitted to impeach the witness by introduction of her juvenile record, which was believed to include an adjudication of delinquency for robbery, and adjudications for runaway and for prostitution on several occasions. On the other hand, the defendant's credibility, over objection, was impeached by the introduction of a conviction for unlawful possession of a firearm.

The defendant was also prohibited from showing on cross-examination that the witness was not married, as claimed, and that she had misrepresented the date of birth of her child in order to delay the trial so that she could testify after delivery rather than while over eight months pregnant. The purpose of all such cross-examination was, primarily, to impeach the witness's credibility, and further to present evidence to support the defendant's theory that the witness had motive to and in fact did commit the offense herself. These matters are more fully set out in a motion filed by the *amicus* in his trial which is reprinted herein as Appendix A.

The *amicus*, therefore, has a direct interest in this Court's determination of the question whether a defendant's right of confrontation is impermissibly restricted by prohibiting impeachment by the introduction of a principal government witness's juvenile record.

Argument

The Rights of Confrontation and of a Fair Trial Are Impermissibly Infringed by a Blanket Prohibition on the Use of Juvenile Records To Impeach the Credibility of a Key Prosecution Witness.

This Court has but recently reaffirmed the importance of the right of cross-examination, which is an essential

element in the constitutional right of confrontation. *Chambers* v. *Mississippi*, 93 S.Ct. 1038, 1046 (1973). It is "an essential and fundamental requirement for" a fair trial. *Id.*, quoting from *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965). See also *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Alford* v. *United States*, 282 U.S. 687, 692-94 (1931); *United States* v. *Masino*, 275 F.2d 129, 132-33 (2 Cir., 1960).

It is also well settled that state rules of evidence based upon valid state concerns cannot automatically justify an infringement of these basic constitutional rights. *E.g.*, *Chambers* v. *Mississippi*, *supra*; *Brooks* v. *Tennessee*, 406 U.S. 605 (1972); *Lisenba* v. *California*, 314 U.S. 219, 236 (1941); *Bonner* v. *Beto*, 373 F.2d 301 (5 Cir., 1967). In *Hamburg* v. *State*, 248 So.2d 430, 434 (Miss., 1971), the Supreme Court of Mississippi held:

> "We are of the opinion that the broad fundamental right of an accused to cross-examine his accuser transcends the right the juvenile has to keep secret his former delinquent activity."

This is particularly so where the evidence sought to be elicited on cross-examination is favorable to the accused. See *Giles* v. *Maryland*, 386 U.S. 66 (1966).

This Court but recently recognized that where the "denial or significant diminution" of the right of confrontation is occasioned by a state rule of evidence, it is the duty of this Court to "closely examine[ ]" the competing interest. *Chambers* v. *Mississippi*, *supra*, at 1046. It is respectfully submitted that any state interest in excluding evidence of a prosecution witness's juvenile record cannot bear such examination.

The primary state interest is indicated by the fact that

most state statutes on the subject prohibit the use of juvenile records "against the child". See, *e.g.*, Massachusetts General Laws, Chapter 119, Section 60; District of Columbia Code 1961, §11-918; and the statutes in *People* v. *Smallwood*, 306 Mich. 49, 10 N.W.2d 303, 304 (1943); *Hamburg* v. *State*, 248 So.2d 430, 433 (Miss., 1971); *State* v. *Searle*, 125 Mont. 467, 239 P.2d 995, 998 (1952); *State* v. *Hale*, 21 Ohio App.2d 207, 256 N.E.2d 239, 243 (1969). When the juvenile is a witness, and not a party to the proceeding, the purpose of such statutes, and the purpose of the underlying state interest, is not defeated by permitting use of juvenile records to impeach the witness's credibility. *State* v. *Searle*, *supra*, at 998. Moreover, use of juvenile records for this purpose is to impeach credibility, not to impeach character, and it is the character of the juvenile that the statutes are designed to safeguard. *People* v. *Smallwood*, *supra*, at 305. In federal cases, the trial judge is now properly given discretion relative to the admission of juvenile records of a witness. Rules of Evidence for United States Courts and Magistrates, Rule 609(d). See 93 S.Ct. No. 5 (January 1, 1973).

The lack of a substantial state interest against the admissibility of such records is further indicated by the numerous decisions permitting their introduction in view of particular circumstances, or permitting the underlying facts to be introduced while not the records themselves. See, *e.g.*, *State* v. *Homolka*, 158 Kan. 22, 145 P.2d 156 (1944) (not error to permit introduction of juvenile record of defendant since defendant used a juvenile record against a government witness); *State* v. *Hale*, 21 Ohio App.2d 207, 256 N.E. 2d 239 (1969) (juvenile record introduced against defendant in violation of terms of a statute not error where defendant put his good character in issue); *State* v. *Frayer*, 17 Utah2d 968, 409 P.2d 968 (Utah, 1966) (cross-examination of defendant as to prior juvenile record permissible

where defendant testified as to his "haloed history" and actual records of the juvenile court not used); *People* v. *Vidal*, 26 N.Y.2d 249, 257 N.E. 2d 886, 889 (1970) (underlying acts of defendant committed while a juvenile may be used to impeach although juvenile adjudication based on such facts may not).[2]

Many of the cases holding that juvenile records may not be used to impeach credibility are distinguishable in that they involved the use of such records against defendants. As the Rules of Evidence for United States Courts and Magistrates, Rule 609(d), recognize, very different considerations are involved with defendants as opposed to witnesses.

As in *Hamburg* v. *State*, *supra*, the Supreme Court of Utah has also recognized that the exclusion of a juvenile record from the evidence may result in a miscarriage of justice. In *State* v. *Frayer*, 17 Utah 2d 268, 409 P.2d 968 (1966), the court observed that to prevent cross-examination as to a juvenile whose testimony was designed to paint a spotless history of himself "would be jurisprudentially naive and most unfair in the judicial administration of criminal justice". 409 P.2d, at 970.

When the government presents a witness, regardless of the presence or absence of specific testimony on his or her good character, the witness bears the imprimatur of the government and his or her testimony carries with it the implicit representation of the government that the testimony is truthful. To keep from the jury evidence tending to impeach the witness's credibility is equally "unfair" to the administration of criminal justice.

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[2] The question as to whether the juvenile record of a defendant may be introduced to impeach him or her at his or her own criminal trial is of course not presently before this court, and we do not urge that that be permitted except, perhaps, in the *Homolka* situation.

Conclusion

For the reasons above stated, it is apparent that the considerations involved in the prohibitions in most state statutes against use of juvenile records stem from a salutary purpose not to permit the records of juveniles to follow them through their lives to their injury. However, when a juvenile is not directly a party to a criminal case and when cross-examination to the credibility or to the interest of the juvenile is restricted by the prohibition, there is a greater interest in confrontation, which is protected by the Sixth and Fourteenth Amendments to the Constitution of the United States. It is respectfully submitted that this Court, in the case before it, should adequately protect the constitutional interest.

Respectfully submitted,

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Featherston, Homans, Klubock & Griffin
45 School Street
Boston, Massachusetts 02108
Counsel for amicus,
Arthur Bembury.

APPENDIX A

DEFENDANT'S MOTION TO STRIKE OR FOR ALTERNATIVE RELIEF

The defendant moves that all of the testimony of the witness Faye French, also known as Faye Simmons be stricken on the grounds that by reason of the following her testimony cannot be believed and the defendant has been denied due process of law by the reception of her testimony in evidence and the limitation placed upon cross-examination of the witness by the court:

1. In this court on June 23, 1971, the witness testified in substance that when she saw the defendant following his being brought in handcuffs to 37 Schuyler Street after Mrs. Simmons, the deceased, had been shot, she asked the defendant, "Why did you do it?" to which he responded, "But I love you." At a hearing in the Municipal Court of the Roxbury District on March 9, 1970, the witness testified under oath that when she came in the back of the house the defendant was in the kitchen with police officers and she was further asked the following questions and gave the following answers:

Q. At that time, did you hear the defendant tell the police or did the defendant tell you that he had not shot your mother? A. No.

Q. Now, did you ask the defendant whether he had shot your mother? A. I didn't ask him anything.

Q. You didn't say anything to him at all? A. No.

2. That when this case was called for trial on April 21, 1971 the witness or someone on her behalf communicated to the district attorney that she had been delivered of a child on that morning or the morning before and that the records of the City of Boston as to births and deaths show that on May 1, 1971, the witness was delivered of a child, "Nicole".

3. That the witness testified that she was married in Providence, Rhode Island on May 9, 1971 to one Richard French, that the signer of this motion is informed and believes, upon the basis of information received from the City Clerk of the City of Providence, Rhode Island, and therefore avers that there is no record of a marriage between Faye Simmons and Richard French at any time during the month of May in Providence, that the only record of marriage of a person named Simmons is a record of the marriage of one Wendy Simmons to one Patriarca, that Rhode Island law requires parental consent to the marriage of a female under the age of 18 and that, as to marriages of females under the age of 16, that Rhode Island law requires that the marriage be approved after petition to the Family Court, that Faye Simmons was born on June 6, 1955 and was therefore on May 9, 1971, fifteen years of age, and under the age of sixteen.

4. That the defendant is informed and believes and therefore avers that the said Faye Simmons was reported to the Boston Police as a missing person twice during the year 1968, that she has been the subject of proceedings in the Boston Juvenile Court involving allegations of the following conduct on her part, prostitution, unarmed robbery and runaway, but that the undersigned is unaware because of the requirements of law of the exact details of such proceedings.

5. That if the witness testifies falsely under oath as to such matters as her marital status and if, as it appears, she misrepresents or causes to be misrepresented the date of birth of her child, knowing that such misrepresentation will cause delay in a trial in which she is to be a witness, her credibility of matters material to this case is most seriously in question but that the jury is unable to form upon the basis of the evidence before them a complete judgment on whether or not the witness is credible.

And the defendant further moves if this Court does not strike the testimony of the witness, that counsel be permitted to recall the witness and to cross-examine her on these and other matters as to which his cross-examination has been limited.

And the defendant further moves that any and all juvenile court records or copies thereof in the possession of the Court be marked for identification as exhibits in this case and be thereafter impounded, subject only to the examination of this Court and any other Court of the Commonwealth.

By his attorney,
(s) WILLIAM P. HOMANS, JR.
WILLIAM P. HOMANS, JR.

SUFFOLK, ss. Boston, Massachusetts
June 24, 1971

Then personally appeared the above-named WILLIAM P. HOMANS, JR. and made oath as to the truth of the above statements, except such as are stated to be upon information and belief, and, as to them, that he believes them to be true.

(s) NOTARY PUBLIC
Notary Public
My Commission Expires:

PETITIONERS' BRIEF

FILE COPY

Supreme Court, U. S.
FILED
APR 16
MAY 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5794

JOSHAWAY DAVIS,

Petitioner,

v.

STATE OF ALASKA,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALASKA

PETITIONER'S BRIEF

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No. 72-5794

JOSHAWAY DAVIS,

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STATE OF ALASKA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALASKA

PETITIONER'S BRIEF

OPINION BELOW

The opinion of the Supreme Court of Alaska affirming petitioner's conviction is reported at 499 P.2d 1025 (1972), was handed down on July 28, 1972, and the mandate issued on September 13, 1972. The Supreme

Court of Alaska opinion in *Davis v. State* is also set forth in the Appendix at pages 45-66.

JURISDICTION

Petition for a Writ of Certiorari was filed on November 30, 1972, and certiorari was granted on February 20, 1973. This court's jurisdiction is evoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES INVOLVED

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute 11.20.100:

Burglary not in dwelling house. A person who breaks and enters a building within the curtilage of a dwelling house but not forming a part of it, or who breaks and enters a building or part of it, or a booth, tent, railway car, vessel, boat or other structure or erection in which property is kept, with intent to steal or commit a felony in it, is guilty of burglary, and upon conviction is punishable by imprisonment in the penitentiary for not less than two nor more than five years.

Alaska Statute 11.20.140:

Larceny of money or property. A person who steals money, goods, or chattels, or a government note, a bank note, promissory note, bill of exchange, bond, or other thing in action, or a book of accounts, order or certificate concerning money or goods due or to become due or to be delivered, or a deed or writing containing a conveyance of land or interest in land, or a bill of sale, or writing containing a conveyance of goods or chattels or interest in them, or any other valuable contract in force, or a receipt, release or defeasance, or a writ, process, or public record, which is the property of another, is guilty of larceny. Upon conviction, if the property stolen exceeds $100 in value, a person guilty of larceny is punishable by imprisonment in the penitentiary for not less than one nor more than 10 years. If the property stolen does not exceed $100 in value, the person, upon conviction, is punishable by imprisonment in a jail for not less than one month nor more than one year, or by a fine of not less than $25 nor more than $100.

Alaska Statute 47.10.080:

Judgments and orders. (g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

Alaska Rules of Juvenile Procedure, Rule 23:

Adjudications, Orders, and Dispositions Inadmissible. No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Alaska Civil Rule 43(g)(11)b:

Impeachment by Adverse Party. A witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief. He may not be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or the record of a judgment that he has been convicted of a crime.

QUESTION PRESENTED FOR REVIEW

Must the statutory anonymity given juvenile court records accede to the Sixth Amendment confrontation rights of the accused when a juvenile is testifying for the prosecution in a criminal action?

SUMMARY OF ARGUMENT

Chief prosecution identification witness Richard Green was on probation to the juvenile court for burglary. A burglarized safe was found on his property, and Green testified that he had seen petitioner earlier in the day standing near where the safe was found. Green initially identified petitioner from a series of pictures shown him at the Anchorage City Police Station. The circumstances of this show up were inherently coercive inasmuch as it took place in a small room in the presence of four police detectives, one of whom was packaging pistols.

Petitioner was arrested and paint chips and insulation fibers that "could have originated" from the stolen safe were found in the trunk of his rented car. No other evidence of an incriminating nature was obtained or presented.

The trial of the case was centered upon Green's identification. Petitioner was precluded by a protective order issued by the trial court from revealing Green's juvenile record and circumstances of probation to the jury to show that Green was under apprehension and had self interest in making the identification.

The origins of the Sixth Amendment's guarantee of cross examination have ancient roots. *Wigmore*, Vol. V, Sec. 1395, pp. 122-24 (3rd ed.). In a long line of cases this Court has recognized the right of cross examination to be essential for a fair trial and applicable to the states. *Pointer v. Texas*, 380 U.S. 400 (1965). This Court has

also ruled that the accused has the right to place prosecution witnesses in their proper setting and the trial court has no authority to limit cross examination to protect a witness save when the Fifth Amendment is invoked. *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1968). Evidentiary rules concerning the protection of juvenile records from disclosure were created only to protect the juvenile in actions against him and necessarily must yield to the Sixth Amendment rights of the accused.

Lower court decisions against petitioner's position are distinguishable in that confrontation was not an issue or was not discussed. Michigan and Mississippi courts have adopted rules supportive of petitioner's position. *Hamburg v. State*, 248 So.2d 430 (Miss. 1971); *People v. Davies*, 34 Mich. App. 19, 190 NW2d 694 (1971).

The trial court's protective order deprived petitioner of a fair trial. The error was not harmless as Green was concededly the essential witness at trial, and the remainder of the prosecution's case was weakly circumstantial.

STATEMENT OF THE CASE

Between the hours of 5 A.M. and noon on the 16th day of February 1970 the Polar Bar at Fifth Avenue and Eagle Street in Anchorage, Alaska was apparently burglarized (Tr. 101-02).[1] Among the various items stolen from the Polar Bar was a Mosler safe containing two payroll checks drawn from the account of Universal Services, Inc. in the approximate aggregate amount of $1,000.00 and about $500.00 in cash (Tr. 105, 117-18).

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[1] "Tr. ____" refers to the trial transcript, "A. ____" refers to the Appendix and "R. ____" to the record before the Alaska Supreme Court.

Witness Richard Green, a minor on probation for burglary (A. 4-22),[2] stated that around noon of the day in question he observed two black male persons standing near a metallic-colored Chevrolet sedan on his stepfather's property near Palmer, Alaska—approximately 30 miles north of Anchorage (A. 29, 30). The car was on an old road, and Green saw nothing suspicious in the incident (A. 40).

At approximately 5:00 P.M. on the same day a safe was discovered some three feet from where Green said he had observed the two black men (A. 27, 32, Tr. 298). The safe was not discovered by Richard Green (A. 27). The safe was later identified as the one allegedly taken from the Polar Bar. It had been broken into and the contents were never found (Tr. 103, 105-06, 282).

On the next day, February 17, 1970, Richard Green was taken to the Anchorage City Police Station in a police car where Investigator George Weaver conducted an interrogation and showed him various mug shots (Tr. 230) from which Green selected petitioner Joshaway Davis' photograph (Tr. 235-36). The identification took place in the police investigator's office, a room approximately 20 feet by 50 feet in size, with four detectives present. Investigator Weaver was packaging pistols at the time, and Richard Green was seated between Investigators Weaver and Gray and shown some six photographs which he viewed for about 30 seconds before he selected that of Joshaway Davis (Tr. 231-34).

Investigators Weaver and Gray then made a systematic check of the various auto rental agencies in Anchorage and found that a car approximating the description given

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[2]See also respondent's Opposition to Petition for Writ of Certiorari, p. 5.

by Green had been rented on February 12, 1970 by the Airways Rent-A-Car agency of Anchorage to Joshaway Davis (Tr. 226). George Weaver then made an affidavit before a state district judge for the issuance of a search warrant directed both at the residence occupied by Joshaway Davis and the rented car (R. 66-87). A search warrant was obtained and various clothing, papers and personal effects were seized from Davis' residence. The automobile was vacuumed for samples of debris and the trunk mat and tire iron were taken (Tr. 256). No cash or payroll checks were found in Davis' possession (Tr. 282).

Joshaway Davis was arrested contemporaneously with the execution of the search warrant (Tr. 240). Richard Green subsequently identified Joshaway Davis at a lineup (Tr. 1-57). On the 24th of February 1970 Joshaway Davis was indicted by an Anchorage grand jury upon one count of burglarizing the Polar Bar on February 16, 1970 and one count of grand larceny from the Polar Bar at the same time and place (A. 1-2). Trial commenced on September 28, 1970.

The issue of Green's juvenile record initially arose during the voir dire examination of prospective jurors when the prosecution moved for a protective order to preclude discussion during jury selection and cross examination of witnesses of the fact that witness Richard Green had been adjudicated to be a delinquent and was under supervision of the juvenile court (A. 5. Green was on probation for the burglary of two cabins (A. 15). Both sides characterized Green's testimony as essential to the State's case (A. 4, 6). Initially the court was favorably disposed toward denying the prosecution's request for a protective order. However, during the overnight recess the judge had a change of heart and granted the motion *in toto.* In ruling the court stated:

THE COURT: I agree, Mr. Wagstaff. I'm doing this for the record. My comments are for the record because I feel since our supreme court has limited me and the statute limits me and I am here to enforce the law, I have to follow it whether I agree with it or not and whether I like it or not and I'm doing so to the best of my ability although I find moments of rebellion within my own soul. Anything further, Mr. Ripley?

MR. RIPLEY: No, Your Honor, but since it is a hairline area and since the slightest injudicious (indiscernible–cough) on cross examination can lead to a situation which will become instantly in violation of the court's order, I hope that all parties are clear. It's my understanding that not only will there be no reference to juvenile trials or adjudication, juvenile record, supervision by parole or police authorities, police contacts or police investigation, because anything that opens up anything in that area, support it, goes directly to the adjudication, which is denied.

THE COURT: I am granting you this protective order accordingly and Mr. Wagstaff I'm certain will follow it.

MR. RIPLEY: I'm sure he will.

THE COURT: I know he disagrees with me and I, as I say, sympathize, as I stated for the record, but I'm sure that Mr. Wagstaff would be very judicious in his cross examination in that area.

MR. RIPLEY: As long as it's clearly understood.

THE COURT: Yes.

MR. RIPLEY: Thank you, Your Honor.

THE COURT: Anything further, Mr. Wagstaff?

MR. WAGSTAFF: No, Your Honor. (A. 21-22)

The cross examination of Richard Green was conducted under the explicit strictures of this protective order. Green's testimony revealed that he was first informed of the finding of the safe by his mother (A. 27). Green testified that earlier in the day he had observed two black males, one of whom was holding something similar to a crowbar, standing by a metallic blue Chevrolet near where the safe was later found (A. 29-31). Green testified that he had been enroute to get some coffee from another house on his father's property at the time and that the two men were still in about the same position when he returned from his errand (A. 31). He then identified Joshaway Davis as one of the men he had seen and spoken with (A. 31-32). Green admitted that he had previously picked Joshaway Davis' photo from a series of pictures (A. 33, 35) and further admitted that the man in the picture he identified did not look exactly like the man he claimed to have seen in Palmer (A. 35).

On cross examination defense counsel asked Green whether or not he was upset when a safe was found on his property; the answer was no. Counsel next asked whether Green initially felt that he might in some way have been a suspect himself; the answer was no. Counsel asked whether or not Green had felt uncomfortable about the situation; the answer was no. Counsel asked whether it occurred to him that the police might think he had something to do with the burglary; he answered that it had crossed his mind. Counsel asked if he had ever been questioned before by law enforcement officers; his answer was no (A. 33-34).

FBI expert Palmer testified that paint chips found in some of the vacuum debris from the rented car were similar to the paint on the safe and "could have originated" from the safe (Tr. 180). He did not know

whether or not different safe manufacturers used the same type of paint or whether the paint actually came from a safe at all (Tr. 181). FBI expert Hughes testified that some of the vacuumed evidence taken showed signs of vermiculite insulation fibers, but he could not testify that they came from the safe in question or even a Mosler safe (Tr. 206). No paint chips or fibers were found on petitioner's boots, coat, trousers or coveralls (Tr. 186, 208) nor on the tire iron (Tr. 256). Investigator Weaver linked the paint chips and vermiculite fibers only with the trunk of the rented vehicle (Tr. 176-80, 201-05, 263-65, and prosecution's summation Tr. 387). The jury returned a verdict of guilty on both counts (A. 3, R. 199-201).[3]

ARGUMENT

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS ABROGATED BY THE TRIAL COURT'S PROTECTIVE ORDER.

A. General History and Supreme Court Decisions

The origins of the right to confrontation are found in the common law. Wigmore writes that the right of confrontation became firmly established in the early 1700s with the final establishment of the hearsay rule:

> It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one:
>
> (1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands con-

[3]The facts of the case are also stated in the Supreme Court of Alaska's opinion (A. 45-47).

frontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

That this is the true and essential significance of confrontation is clear, from the language of counsel and judges from the beginning of the Hearsay rule to the present day:[4] *Wigmore on Evidence*, Volume V, Section 1395, pp. 122-24 (3rd ed).

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[4]1680, L.C.J. Hale, Pleas of the Crown, I, 306 (commenting on St & 6 Edw. VI, c. 12 §12 (1552); "which said accusers (of treason) at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that that they have to say to prove him guilty"): "Yet in case of treason, where two witnesses (i.e. accusers) are required, such an examination (before a justice of peace) is not allowable, for the statute requires that they be produced upon the arraignment in the presence of the prisoner, to the end that he may cross-examine them."

1696, *Fenwick's Trial*, 13 How. St. Tr. 591, 638, 712 (before the House of Commons). Sergt. *Lovel* (for the prosecution): "We have Mr. Goodman's examination under the hand of Mr. Vernon; we pray it may be read." Sir. B. *Shower* (for the accused): "Mr. Speaker, . . . I humbly oppose the reading of this examination, as not agreeable to the rules of practice and evidence, and that which is wholly new. . . . No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination and might have cross-examined him or examined to his credit, if he thought fit. . . . Our law requires persons to appear and give their testimony 'viva voce'; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances which may lay open the falisty of a well-laid scheme, which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read. . . . We oppose it at present for that we were not present

In *Greene v. McElroy*, 360 U.S. 474 (1959), a case in which this Court held that procedural due process' requirement of confrontation applied to the revocation of a private employee's security clearance by the Department of Defense, the even more ancient roots of confrontation were alluded to:

> When Festus more than 2000 years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to

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nor privy nor could have cross-examined him." Sir T. *Powis*, arguing: "How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence; and that is due to every man in justice."

1720, *Duke of Dorset v. Girdler*, Finch's Prec. Ch. 531: "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III, c. XIX: "Under the head of Confrontation may be found whatever advances (scanty indeed they will be seen to be) have been made in Roman procedure towards the introduction of that universal and equal system of interrogation above delineated and proposed,—consequently whatever part has been covered by the Roman law of the ground covered by the operation called Cross-examination in English law. The operation has two professed objects: one is the establishing the identity of the defendant, viz. that the person thus produced to the deponent is the person of whom he has been speaking; the other is that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his disadvantage, to obtain the extraction of such other part (if any) of the facts within the knowledge of the deponent as may operate in his favor. . . . (It is in Continental law) an imperfect modification of cross-examination, . . . a faint shadow of it."

> have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crimes laid against him." Acts 25:16. 360 U.S. 474, 496, N. 25.

Last century, in *Mattox v. United States*, 156 U.S. 237, 242 (1895), this Court spoke directly of the Sixth Amendment guarantee of confrontation:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

In *Salinger v. United States*, 272 U.S. 542, 548 (1926), the Court specifically noted the early common law origin of the right of confrontation:

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions. (citations omitted)

Five years later, in *Alford v. United States*, 282 U.S. 687, 691 (1931), a case involving the propriety of asking a prosecution witness on cross examination where he lived, when the purpose of the inquiry was to bring out

the fact that although not convicted the witness was in the custody of federal authorities thereby indicating a tendency toward bias and prejudice, this Court stated:

> Cross examination of a witness is a matter of right (citation omitted). Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his own reputation for veracity in his own neighborhood (citations omitted); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (citations omitted); and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (citations omitted).

Continuing, the Court held that:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him (citations omitted). 282 U.S. 687, 692.

This Court recognized that the legitimate purpose of the question was not to discredit the witness by showing he was charged with a crime, but to show by the fact of his custody that his testimony was biased because given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States–the proponents of his testimony. The Court found that it was not material why the witness was in custody, holding:

> Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out

> of his detention. The extent of cross examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted (citations omitted). But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. 282 U.S. 687, 693-94.

The developing case law of this Court under the Sixth Amendment firmly establishes the right to cross examine with only Fifth Amendment exceptions. Inherent in this right is necessarily the right to discredit a witness' or accuser's testimony by any appropriate means. The Court has stated that evidence of bias, self interest, motive and apprehension are relevant in cross examination. It was further held in *Alford v. United States*, 282 U.S. 687, *supra*, that the jury must be free to determine what pressures a witness is under simply by his being in government custody. The same rationale should and does apply to juvenile probation.

In *Pointer v. Texas* 380 U.S. 400 (1965) this Court recognized that the Sixth Amendment's guarantee protecting the accused's right to confront witnesses against him was obligatory on the states through the Fourteenth Amendment. It was held at 380 U.S. 405:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right to confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that

> to deprive an accused of the right to cross examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

In an opinion handed down the same day, *Douglas v. Alabama*, 380 U.S. 415 (1965), a co-defendant, Lloyd, had claimed his privilege against self incrimination and had his memory "refreshed" by a confession which implicated petitioner Douglas. Since the confession was not admitted into evidence no cross examination was permitted. This Court, reversing, held:

> Hence effective confrontation of Lloyd was possible only if Lloyd affirmed the statement as his. However, Lloyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Lloyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Lloyd's refusal to answer was procured by the petitioner (citation omitted). 380 U.S. 380, 420.

An analogy can be drawn between prosecution witness Lloyd who claimed his privilege against self incrimination and witness Green who, from petitioner's perspective, received the same benefits through the trial judge's protective order. Either way, effective cross examination was curtailed. See also *Barber v. Page*, 390 U.S. 719 (1968).

In the more recent case of *Smith v. Illinois*, 390 U.S. 129 (1968), this Court found that the sustaining by the trial court of the prosecution's objection to questions on cross examination as to the witness' correct name and place of living, apparently on the basis that he somehow might be endangered thereby, was violative of the Sixth Amendment right to confrontation. In so doing the Court revitalized *Alford v. United States*, 282 U.S. 687, *supra*,

citing it extensively and indicating that any considerations concerning the non-constitutional protection of an accusatory witness must necessarily yield to the confrontation rights of the Sixth Amendment. So, too, in the case of a juvenile witness–any statutory right protecting his juvenile court records must necessarily give way to the Sixth Amendment confrontation rights of the accused. See *Chambers v. Mississippi*, ___ U.S. ___, 12 CrL 3150 (1973) rejecting the "voucher" rule.[5]

The Rules of Evidence for United States Courts and Magistrates, ordered adopted by this Court on November 20, 1972, 12 CrL 3011, recognize petitioner's position for federal courts inasmuch as Rule 609(d) permits the admissibility of a juvenile adjudication of a witness other than the accused if it would be admissible against an adult to affect credibility and the trial judge is satisfied that its admission is necessary for a fair trial.

B. The Trial Court's Ruling Violated the Sixth Amendment

The Alaska Supreme Court found the series of questions initially propounded to Richard Green on cross examination adequate for confrontation purposes (A. 59-60). These few questions, answered in a negative and self serving manner, cannot be a constitutionally adequate substitute for permitting the jury to hear and consider those relevant facts pertaining to Green's circumstances

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[5] "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional rights of confrontation and helps assure the 'accuracy of the truth determining process' . . . its denial or significant diminuation calls into question the ultimate 'integrity of the fact finding process' and requires that the competing interest be closely examined." ___ U.S. ___, 12 CrL 3153.

which reflect upon his credibility. In this context it should be recalled that the protective order which precluded any effective relevant cross examination was granted during the voir dire examination; witness Green therefore knew of its existence before he testified. When Green testified that he had never been questioned by police officers before, he could only have done so secure in the knowledge that he could not be impeached on this particular issue. Witness Green knew he could answer any questions of this nature in a self-serving manner, unfettered by any possibility of specific impeachment or demonstration of bias, self interest, motive or apprehension. The jury was never permitted to assess for itself the pressures Green necessarily would have felt before identifying someone else out of a group of photographs—which identification was, by his own testimony, less than positive.

The circumstances of station house interrogations have been recognized by this Court to be inherently coercive. *Miranda v. Arizona*, 384 U.S. 436 (1966). To this basic reality were added a small room, the presence of four police officers, a seat between two detectives and the packaging of pistols. Under the trial court's protective order the jury was encouraged to believe that witness Green was only performing a civic duty with his identification. The jury was not allowed to determine the effect that the above circumstances would have on a juvenile on probation for burglary who had a stolen safe discovered on his property. After the cursory photographic show up Green was frozen to an identication of Joshaway Davis and was not about to change his mind. As was noted in *United States v. Wade*, 388 U.S. 218, 229 (1967):

> Moreover, it is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may be (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial.

Furthermore, counsel was precluded by the court's order from asking Investigators Weaver and Gray what pressures they put on Green when they interrogated him—specifically with respect to the fact that Green was on probation for burglary. Investigator Gray testified he at no time suspected Green himself was involved in the burglary (Tr. 136-39). Counsel should have been permitted to ask Gray whether this absence of suspicion was consistent with his knowledge of Green's burglary record and the fact the safe was discovered on Green's property.

The trial court issued its protective order pursuant to Alaska Rule of Juvenile Procedure 23 and Alaska Statute 47.10.080, cited above. The Alaska Supreme Court in Section 4 of its Opinion (A. 59-60) discusses the general issue raised herein. Although the majority opinion adverted to a conflict between the statutory interest in protecting the anonymity of a juvenile transgressor and the constitutional interest of affording the defendant an adequate opportunity to confront adverse witnesses, the court found that counsel for the defendant was able to adequately question witness Green concerning the possibility of bias or motive. The court found that the indirect references to the juvenile witness' apprehension or possibilities of bias or motive were sufficient for adequate cross examination albeit these assurances were conceded to be self serving. Petitioner urges upon this court Justice (now Chief Justice) Rabinowitz's dissenting opinion to this issue, set forth on pages 63 through 65 of the

Appendix. Justice Rabinowitz found the trial court's protective order erroneous in curtailing cross examination of the crucial juvenile witness. He specifically found that this error was not harmless under *Chapman v. California*, 386 U.S. 18 (1967), and recognized that the purpose of bringing out the juvenile record was to show the witness' bias as well as his motive in giving testimony for the prosecution. Quoting from his dissent:

> In the case at bar, the majority believes that Davis' constitutional right of confrontation was satisfied because his counsel "alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension". In my view, this falls far short of the confrontation right guaranteed Davis. Vague speculations concerning ulterior motives and the possibility that the juvenile witness' identification of Davis arose from apprehension are hardly adequate substitutes for bringing home to the jury the fact that the juvenile witness was on probation for burglary at the time he testified. The right of confrontation required that Davis be permitted to show that the witness was on probation for burglary and also encompassed the right to inquire into the circumstances of the witness' relations with the police.
>
> I find the majority's reliance upon Rule 23, Alaska Rules of Children's Procedure, inappropriate here. The accused's fundamental right to confront adverse witnesses against him outweighs any interest in protecting a juvenile witness from disclosure of his prior adjudication of delinquency and from disclosure of the disposition order.

The juvenile rules and statutes in question were not enacted to abrogate the rights of the accused; their

purpose is only to create anonymity of records. The only protection a witness is entitled to when he testifies against another in a criminal case is that found within the Fifth Amendment. His records as a juvenile are admissible to attack general credibility and the circumstances thereof to show any bias, self interest, motive or apprehension within his testimony. The mere fact of a juvenile record would give rise in and of itself to argument that the witness' testimony was affected by his desire to better his own position in the eyes of the government who has called him forth to testify. The true purpose of the rule would be frustrated and perverted if a juvenile record were not available to be shown to the jury when the juvenile is testifying against the accused in a criminal prosecution, particularly when the record and circumstances surrounding it would show a tendency toward bias, self interest, motive or apprehension. Wigmore notes this distinction:

> A judgment, finding or proceeding of delinquency in a juvenile court is by modern statutes forbidden to be used "against the child" in any other court. It would be a blunder of policy to construe these statutes forbidding the use of such proceedings to affect the credibility of the juvenile when appearing as a witness in another court. A typical delinquent is a girl of corrupted environment of nymphomaniac tendency; such a girl is often the cause of injustice to an innocent man by making false charges of rape or indecent liberties and the revelations in the juvenile court may be the best or even the only means of exposing the testimonial untrustworthiness of the witness. Neither the policy nor the wording of the statute (liberally construed) should forbid such use. *Wigmore on Evidence*, Volume 3a, §980(7), page 834 (revised edition 1970).

The only real interest of the juvenile is to prevent public disclosure of his record with possible attendant societal sanctions. This interest can be protected in appropriate cases by the expedient of excluding the public from the courtroom during the critical portion of the examination as is generally the case with juvenile proceedings.

C. Lower Court Decisions

Several state and federal courts have ruled either near or directly on this issue. *Brown v. United States*, 338 F.2d 543 (D.D.C.A. 1964), is a typical case in example. The opinion written by Circuit Judge Warren E. Burger held that it was error for a prosecutor, on cross examination of a juvenile companion of the defendant's whose testimony exculpated defendant, to bring out that the juvenile companion had been committed to The National Training School. The court held that the juvenile record was inadmissible for impeachment as commitment to The National Training School was not the equivalent of a criminal conviction under any theory. Under District of Columbia Code of Evidence only a criminal conviction was admissible for impeachment. This case is distinguishable on two grounds: Initially, as the witness in question was a defense witness the right of confrontation under the Sixth Amendment was not involved; and secondly, in the case at bar the admission of the juvenile record was not sought solely for purposes of general impeachment by a criminal conviction but was offered for the additional purpose of showing the apprehension, motive, self interest and bias of the

witness. Other cases apparently against petitioner's position are similarly distinguishable.[6]

[6]The following cases are representative.

State v. Tolias, 326 S.W.2d 329, 333 (Mo. 1959), was a murder case in which the defendant claimed the trial court erred in not permitting him to show that a state's witness had been convicted in a juvenile proceeding of stealing "in matters growing out of this case" and at the time of trial was confined in a juvenile institution. Defendant contended that these matters went to the interest and credibility of the witness. The Missouri Supreme Court held that the disposition of a case in juvenile court is not deemed a conviction and is not admissible "for any purpose whatsoever". The court held there was no error but did not discuss any matters of self interest, bias, motive or apprehension of the witness nor was the Sixth Amendment mentioned.

In *State v. Laws*, 50 N.J. 159, 233 A.2d 633 (1967), the prosecution brought out that one of its witnesses had been committed for certain juvenile offenses; the New Jersey Supreme Court found the clear legislative policy in New Jersey was that any adjudication of juvenile offenses should not be viewed as criminal convictions and were not admissible as evidence against a juvenile in any other court proceedings. The court accordingly held that the state might well have withheld its evidence with respect to the witness' juvenile adjudications (it was one of defendant's specifications of error) and that its mention was helpful to defendants.

In *Noel v. State*, 215 N.E.2d 539, 541 (Indiana 1966), a prosecution for prostitution, the defense attempted to bring out the juvenile record of the chief prosecuting witness who was on parole from the "Girls School". The trial court found it inadmissible, and the Indiana Supreme Court affirmed stating that the Indiana statute relating to the secrecy of juvenile records mandated that a juvenile record not be used for purposes of impeachment. The court did not mention bias, self interest, motive, apprehension or the Sixth Amendment right of confrontation.

Another example of this genre of cases is *Witt v. State*, 244 N.W. 395 (Neb. 1932), a rape case in which the defendant attempted to show that two of the state witnesses had been

The historically leading case which favors petitioner's position is *People v. Smallwood*, 306 Mich. 49, 10

committed to a state girls' training school. The Nebraska Supreme Court, without mentioning confrontation or bias, held that the proffered evidence was not relevant to any issue in the case and was therefore properly excluded.

In *Larkin v. United States*, 144 A.2d 100 (M.C.A.D.C. 1958), the court held, without discussion, that in a prosecution for indecent assault on a 14-year-old boy the juvenile court records of the alleged victim were inadmissible. The court did indicate that if the records showed similar accusations in the past the records would have relevance, but as this was not raised at trial it could not be raised now.

In a case which skirts the basic issues, *United States v. Fay*, 240 F. Supp. 848 (S.D.N.Y. 1965), a federal habeas corpus proceeding in which Fay complained that he was not permitted to bring out the juvenile record of an alleged accomplice of his who plead guilty and testified for the state, the court held it was harmless error because his criminal proclivities were demonstrated adequately by his adult record. The court found that the jury was well aware of the witness' criminal activities and that his own interest might well have motivated him to give false or fabricated testimony against the petitioner. The court held, in light of the state's policy of "obliterating the transgressions which give rise" to a youthful offender adjudication, the fact the jury was not specifically apprised of the witness' youthful derelictions did not deprive petitioner of fair trial. The district court gave strong indication in its opinion that under some circumstances confrontation requires exposure of juvenile records, although the Sixth Amendment was not mentioned directly in the opinion.

In *Martinez v. Avila*, 76 N.M. 372, 415 P.2d 59, 61 (1966), a civil case involving an accidental shooting in which the juvenile records showing involvement of the plaintiff and his witness in a prior accidental shooting were held properly inadmissible for impeachment, the New Mexico Supreme Court stated:

> As a matter of fact the almost unanimous rule in all types of proceedings is to refuse to allow a cross examiner to delve into the juvenile hearing in any manner, subject only to the possible exception of criminal cases in which the question of chastity is made an issue.

N.W.2d 303 (1943), which is also the subject of an annotation appearing at 147 ALR 443. The case involved

The disallowance of the admission of records under the facts of *Martinez* would probably displease Professor Wigmore and raise due process questions, discussed *infra*.

Predictably, courts have generally held that juvenile records are not admissible in civil actions. For example, in *Smith v. Rural Mutual Insurance Company*, 20 Wis. 2d 592, 123 N.W.2d 496 (1963), the Wisconsin Supreme Court held in an automobile negligence case that the fact that a driver's license was suspended could not be admitted against the defendant on cross examination under state law which precluded the adjudication of any juvenile court from being admitted for impeachment.

In the subsequent case of *Banas v. State*, 34 Wis. 2d 468, 149 N.W.2d 571 (1967), the Wisconsin Supreme Court held that, while a conviction may affect the credibility of a witness who has been convicted of a criminal offense, juvenile offenses are inadmissible. Citing *Smith v. Rural Mutual Insurance Company*, 123 N.W.2d 496, *supra*, the court, in an auto theft case, held that the primary witness for the prosecution, who was a 16-year-old parking lot attendant and witnessed the automobile in question being stolen, could not be cross examined concerning his juvenile court record of auto theft. The court stated:

> Counsel for Banas was prevented from examining the juvenile witness concerning his alleged juvenile court record. It is argued this record would show the witness had been found delinquent by the Waukesha County Juvenile Court and other matters including his apprehension and interrogation concerning an auto theft, all of which would go to his credibility. The trial court ruled the juvenile court records were confidential and could be released only by the juvenile court judge and the finding of the juvenile court that the witness stole an automobile was not a conviction in a criminal sense and could not be used for impeachment purposes.
>
> Banas now claims his constitutional rights were violated by this refusal to permit him to impeach the record. We think not. 149 N.W.2d 571, 573.

The record was held inadmissible for impeachment purposes simply because it could not be "deemed a conviction". The court either did not consider or simply ignored any Sixth Amendment

a rape prosecution based solely on the testimony of a 15-year-old prosecutrix who was the defendant's own daughter. The Supreme Court of Michigan found it was error not to permit cross examination to show the witness had been in difficulty with juvenile authorities. The court recognized that juvenile records are generally inadmissible for impeachment but then stated:

> However, in the present case, there was no effort to impeach the child's character but rather to ascertain her credibility. The question of how far the statute should reach is not new.

The court then cites Wigmore, *supra,* for authority. The court stated that juvenile records per se are not admissible but that a question showing trouble with juvenile authorities is. Citing an earlier case, *People v.*

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problems. The facts in this case are remarkably similar in character to the case at bar. The court in *Banas* also cited another earlier decision of its own–*Sprague v. State*, 243 Wis. 456, 10 N.W.2d 109 (1943)–in which it held that a defendant who was charged with statutory rape could not require the introduction of a juvenile record of a complaining witness. This earlier decision definitely conflicts with Professor Wigmore's reasoning and those courts who have recognized these circumstances as a bona fide exception, *infra.* In *Banas* the court was only concerned with the protection of the juvenile's statutory rights per his chances for rehabilitation versus probative value for impeachment. The court was silent on confrontation. 149 N.W.2d 571, 575. Petitioner here at bar argues that juvenile records should be available for impeachment and, as in his case, the argument becomes stronger when the record and attendant circumstances are sought to be used for a direct demonstration of bias, motive, self interest and apprehension. The court in *Banas* even conceded that if the juvenile witness were disbelieved it was quite probable that no jury would or should be convinced beyond a reasonable doubt of defendant's guilt. Petitioner is directly at odds with this holding.

Cowles, 246 Mich. 429, 224 N.W. 387, 388 (1929), the court stated:

> We think the testimony should have been received, not in extenuation of rape, but for its bearing upon the question of the weight to be accorded the testimony of the girl and the question of whether the mind of the girl was so warped by sexual contemplation and desire as to lead her to accept the imagined as real or to fabricate and claim sexual experience. 10 N.W.2d, 303, 305.

The court was apparently impressed with the manifest injustice of the proceedings and desired to rectify them. The Sixth Amendment right to confrontation was not discussed and only impliedly referred to. The attempt to distinguish "impeachment" from "ascertain credibility" is probably a manifestation of a due process theory, *infra*. The same argument can properly be made in the case at bar.

The historically recognized exception to the rule of per se exclusion of juvenile records, when recognized at all, occurs in rape cases. Additional authorities demonstrating the injustice often inherent in the rigid application of the traditional rule of excluding juvenile records are cited in the annotation following 147 ALR 443.

In *State v. Searle*, 239 P.2d 995 (Montana 1952), a sodomy prosecution, the defendant contended on appeal he was unduly restricted on cross examination of a prosecution witness by not being permitted to show that the witness had made prior inconsistent statements before a juvenile tribunal. The court noted that the relevant statute prohibited a record from being used against a child but that a witness is not party to the proceeding and that the purpose of the statute is therefore not defeated by allowing inconsistent statements made by him in juvenile proceedings to be used for

impeachment. The court ruled primarily on statutory interpretation distinguishing *Malone v. State*, 130 Ohio St. 443, 200 N.E. 473 (1936); *State v. Kelly*, 164 La. 753, 126 So. 49 (1930); and *State v. Cox*, 263 S.W. 215 (Mo. 1924), which are cited within the 147 ALR 443 annotation, *supra*.

The cases directly in point follow. The Court is urged to accept their reasoning. These authorities, all quite recent, flow in part from the emerging realization of the basic criminal nature of juvenile delinquency proceedings as represented by *Re Gault*, 387 U.S. 527 (1967) and *Re Winship*, 397 U.S. 358 (1970), requiring proof beyond a reasonable doubt in delinquency proceedings, and reflect the impact of *Pointer v. Texas*, 380 U.S. 400, *supra*, in which the Sixth Amendment confrontation clause was made applicable to the states.

In *People v. Yacks*, 38 Mich. App. 437, 196 N.W.2d 827 (1972), the most recent case, the Michigan court held that if a key prosecution witness had a juvenile record then the defendant, who was denied the opportunity on cross examination to impeach this witness with a prior juvenile record and complained of a Sixth Amendment violation, was entitled to a new trial. The court cited its earlier case of *People v. Davies*, 34 Mich. App. 19, 26, 190 N.W.2d 694 (1971), which stated:

> There is no sound reason for excluding the history of juvenile offenses in a case not "against" the juvenile offender but against someone else whose liberty is at stake. If, as is the law, the jurors are entitled to know "what manner of person the defendant is" if he takes the stand, surely they are also entitled to know what manner of person the people's chief witness is. In this connection it is relevant that our court has held that a judge may consider a defendant's juvenile record when impos-

> ing sentence. Clearly if the policy of a statute does not protect the juvenile against use of his juvenile record against him when he is sentenced for another crime, it is not so pervasive that it protects him against disclosure of his record when he is a witness–here the chief, perhaps indispensible, witness–against someone else.[7]

In *Davies* the court refused to restrict the "Smallwood exception" of the earlier Michigan decision of that name to rape cases (*People v. Smallwood*, 306 Mich. 49, *supra*).

The same court, in *People v. Basemore*, 36 Mich. App. 256, 193 N.W.2d 335 (1971), found reversible the trial court's refusal to allow defense counsel to place before the jury the record of two juvenile identification witnesses, one of whom identified defendant both at the line up and at trial, the other of whom was unable to identify him at line up but did identify him at trial. Again citing *People v. Davies*, 34 Mich. App. 19, *supra*, the court held it was simply per se reversible error to prevent use of a juvenile witness' general juvenile record to impeach his credibility when he testified against someone else. In this case, as in *Davies*, it was not necessary even to show that the nature or circumstances of the juvenile record would have been an independent basis for an attack on credibility, the fact of record alone was sufficient.

In direct point also is *Hamburg v. State*, 248 So.2d 430 (Miss. 1971), in which the Mississippi Supreme Court found error in a case in which the accused was charged with the possession of LSD and was not permitted to cross examine a juvenile whose testimony implicated him

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[7]See Alaska Juvenile Rule 23, *supra*, and *Commonwealth v. Moyer*, 343 Pa. 224; 144 A.2d 367 (1958).

to show the witness was a juvenile delinquent, was afraid of being returned to training school and had committed various specific acts of delinquency, stating:

> The fundamental right to be confronted by witnesses against an accused guaranteed by Article 3, Section 26 of the Mississippi Constitution (1890) and the Sixth Amendment to the Constitution of the United States would be an empty right if the accused were not permitted to cross examine the witnesses as to the reliability of their testimony. It is conceivable that a juvenile could be held to be delinquent because of the illegal handling of narcotics. In that case it would violate every sense of justice if one were accused by such a delinquent but was unable to show that such juvenile was in a place equally accessible to the contraband, and he had previously been declared a delinquent by reason of his connection with illegally handling dangerous drugs.
>
> We are of the opinion that the broad fundamental right of the accused to cross examine his accuser transcends the right a juvenile has to keep secret his former delinquent activity. This is particularly true under the wording of our statute which only prevents the use of a juvenile delinquent's record in proceedings concerning him. 248 So.2d 430, 434.

The court so held even though the trial court had permitted defendant to establish that the witness was on probation as a juvenile.

The *Hamburg* case and the Michigan trilogy of *Davies, Basemore* and *Yacks, supra,* are irreconcilably in conflict with the blanket prohibition cases cited above[8] which fact underlines the need for this Court's action on the issue.

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[8] See *Banas v. State*, 34 Wis. 2d 468, *supra*.

II.

IN ADDITION TO DENIAL OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION, THE TRIAL COURT'S RULING DENIED PETITIONER THE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

It is also urged upon the Court that the denial of the right to cross examine witness Green as to his juvenile record and fact of probation was a denial of the due process of law. Due process of law is not precisely definable or reducible to a mathematical formula. *Gibbs v. Burke*, 337 U.S. 773, 781 (1949). It has evolved to come to express our basic concept of justice under law, "our traditional conception of fair play and substantial justice", *Galvan v. Press*, 347 U.S. 522, 530 (1954); the "protection of the individual from arbitrary action", *Slochower v. Board of Higher Education of New York City*, 350 U.S. 551, 559 (1956); "fundamental principles of liberty and justice", *In Re Groban*, 352 U.S. 330, 334 (1957); whether there has been a "[denial of] fundamental fairness, shocking to the universal sense of justice", *Kinsella v. United States*, 361 U.S. 234, 246 (1960); "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct", *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957); and a "respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', * * * or are 'implicit in the concept of ordered liberty.' ", *Rochin v. California*, 342 U.S. 165, 169 (1952).[9]

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[9] Adapted from *Green v. State*, 462 P.2d 994 (Alaska 1969).

Under these terms and definitions, the denial of the right to cross examine witness Green as to his juvenile record and fact of probation so as to generally attack his credibility and demonstrate bias, motive, self interest and apprehension offends our traditional concepts of fair play and substantial justice.[10]

III.

THE ERROR WAS NOT HARMLESS

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that before constitutional error can be said to be harmless it must be shown beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The Court recognized harmless error as a very narrow doctrine:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. 386 U.S. 18, 22.

Petitioner Davis contends that under the facts of this case the error in the denial of confrontation cannot be said to be harmless. Witness Green's testimony was critical, as admitted by the prosecution (A. 4). Without Green's identification the only evidence against Davis of an incriminating nature were insulation fibers and paint chips that were found in the back of his rented car which only "could have originated" from the safe in question (Tr. 180, 206). No such fibers or paint chips were found on any of the clothing belonging to Davis (Tr. 186,

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[10] See *Pointer v. Texas*, 380 U.S. 400, *supra*.

207-08) and none of the contents of the safe were ever found (Tr. 282).

In the subsequent case of *Harrington v. California*, 395 U.S. 250 (1969), this Court again discussed harmless error and held the lack of opportunity to cross examine co-defendants after their confessions were admitted constituted harmless error because the other evidence was overwhelming and was not circumstantial. *Chapman* was a circumstantial evidence case. The case at bar, even with Green's identification, is totally circumstantial. The test is this Court's judgment, based on a reading of the record, of what the probable impact on the jury would have been if it had known the facts and circumstances of Green's record and probation. A juvenile burglar, on probation for that offense, upon whose property was found a burglarized safe, accuses someone else of being the burglar. This is a vastly different picture from that painted by the prosecution of a public spirited youth who was just trying to help the police.

Green stated that when he initially identified the picture of Davis after a cursory scanning the picture was only "similar" (A. 35). The station house pressures on Green have been described under the first heading herein. At the subsequent lineup where the person portrayed in the picture was present, Green became more locked into the identification and, as noted above, was extremely apt to stick to it. Additionally, Investigator Weaver testified that as he was bringing Green to Anchorage for the photograph show up Green described the shorter of the two blacks he saw as having a mustache (Tr. 231). Green identified petitioner Davis as being the shorter (Tr. 311) but then said the man he saw didn't have a mustache (Tr. 317). The defense in the case as outlined in defense counsel's opening statement (A. 23-25) and closing

argument (Tr. 390-417) was that the identification by Green was not reliable and credible. The defense called no witnesses (Tr. 365). The jury was out from 4:16 P.M. to 11:35 P.M. (Tr. 427) indicating that even with what little they knew about Green, his testimony was not very convincing.

As Justice Rabinowitz stated in his dissent:

> Given Davis' constitutional rights, under both the Alaska and Federal Constitutions, to confront adverse witnesses against him and the quality of the prosecution's totally circumstantial case against Davis, the trial court's erroneous curtailment of cross examination of this crucial juvenile witness cannot be characterized as harmless error under either the *Love v. State*, 457 P.2d 622 (Alaska 1969), or *Chapman v. California*, 386 U.S. 18 (1967), differing standards for determination of harmless error. (A. 63)

CONCLUSION

For the foregoing reasons petitioner Joshaway Davis prays this Court to find the trial court's protective order to be prejudicial constitutional error, reverse, and remand for a new trial.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5794

JOSHAWAY DAVIS,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES INVOLVED

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute 47.10.080(g) is reproduced at p. 10 *infra.*

Alaska Statute 47.10.090 is reproduced at p. 52, *infra.*

Alaska Statute 47.10.100(a):

> Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for his best interest, until he becomes 19 years of age, unless sooner discharged by the court, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

Rule 609(d), Rules of Evidence, 34 L.Ed.2d, No. 5, 69 (1973), is reproduced at p. 53 *infra*.

Alaska R. Juv. P. 23 is reproduced at pp. 10, 53 *infra*.

SUMMARY OF ARGUMENT

Confrontation cases focus on the extent to which the jurors were misled concerning the reliability of the unconfronted testimony. Limiting Davis' cross-examination of Green in the single area of Green's juvenile adjudication and probationary status did mislead Davis' jury to the extent that the foreclosed cross-examination would have impeached Green's credibility. However, this one limitation on the scope of cross-examination of Green did not deprive Davis of due process of law. Davis' jurors still possessed a satisfactory basis for evaluating the truth of the testimony. Clearly, Green's testimony is so trustworthy that full cross-examination would have failed to raise any meaningful doubts in the jurors' minds that simple disclosure of the juvenile record would not have raised, and the juvenile record itself does not significantly impeach the testimony. Moreover, the underlying rationale for prohibiting the disclosure of Green's juvenile record is so strong that Davis' trial would have been fundamentally fair even if the jurors had been significantly misled concerning the reliability of Green's testimony.

STATEMENT OF THE CASE

At approximately 5:00 a.m. on Monday, February 16, 1970, the Polar Bar in Anchorage closed its doors to the Sunday night crowd. (Tr. 101.) Shortly before noon on February 16, three regular patrons of the establishment discovered that one of the bar's doors had been forced open. (Tr. 101-02, 120.) They notified the police, who

investigated and found that a cash box and a jukebox had been broken into and that a small safe weighing approximately 200 pounds and measuring about 25 inches wide and 23 inches deep had been removed from the bar. (R. 10; Tr. 101-03, 282.) The safe contained approximately $1,400 in cash and checks. (Tr. 101, 116-18.)

That afternoon, Jess Straight, an equipment operator at the Anchorage International Airport, stopped on his way home from work at a small store located in the Peters Creek shopping area. (A. 27a; Tr. 298.) His sixteen-year-old stepson, Richard Lee Green, and his eldest brother were with him. They had picked Straight up at work. (Tr. 299.) The three chanced upon Jess Straight's wife (Richard's mother) at the store. (A. 27a; Tr. 298.) Because the Straights had no telephone at home, Mrs. Straight had come to the store to call the Alaska State Troopers to report a safe which had been found near their home by either another of her four sons or by a family acquaintance. (A. 26a; Tr. 146, 298.) After learning about the safe, Jess Straight made the call to the troopers. (Tr. 299.)

The Straights were living at Mile 25 on the Glenn Highway.[1] (A. 26a; Tr. 138, 229.) Their home was located a few hundred yards off the highway and along a little-used side road known as the old Palmer highway. (A. 28a; Tr. 229, 297.) No one lived nearby. (Tr. 229, 297.)

The safe was found approximately 200 yards from the highway in a ditch that ran along the side road. (Tr. 229, 312.) It had been broken into; safe insulation and coins

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[1] Although the record does not disclose the fact, Mile 25 on the Glenn Highway denotes a location 25 miles along the highway from Anchorage toward Fairbanks. Such a description is common knowledge in Anchorage.

were scattered about the area. (R. 11; Tr. 103-04.) Snow had blanketed the ground a day or two before, and one set of tire tracks led along the road at that location. (Tr. 230, 300.) Signs in the snow indicated that the vehicle had stopped for an appreciable period of time near where the safe was found. (A. 32a; Tr. 300-01.) To protect the tracks, Jess Straight felled a tree and laid it across the road as its junction with the highway and placed a barrel in the middle of the road on the other side of the safe. (A. 28a; Tr. 300.)

An Alaska State Trooper was the first police officer at the scene. Richard Green told him that about noon he had seen a late model, metallic blue Chevrolet sedan parked approximately three feet from where the safe had been discovered. (A. 30a, 32a; Tr. 124-25, 217-18, 279-80.) At that time, Green was walking from his home to a house that his stepfather was finishing for their occupancy closer to the highway. (A. 28a-29a.) He saw two Negro men standing behind the car, the shorter of the two wearing a brown or black mackinaw jacket. (R. 10; A. 30a-31a, 40a.) Before Green said anything, the shorter man asked him if he lived nearby and if his father were home. (A. 30a.) Green, while standing about three feet from the man, told him that his father was not at home. (*Id.*) Believing that they were stuck, Green then asked him if they needed help. (*Id.*) The man said no, whereupon Green continued on to the house nearer the road to get some coffee for his mother. (A. 29a-30a.)

Having obtained the coffee, he walked past the two men a few minutes later. Their position was about the same, but this time the shorter man was holding "something like a crowbar." (A. 30a-31a.) No one spoke this time. (A. 31a.) Green did not see the safe. (A. 32a.)

The next morning, Tuesday, February 17, two Anchorage city policemen, aware of the prevalence of late model, metallic blue rental cars and having received a report from the troopers that included Green's description of the automobile, commenced a systematic canvass of Anchorage's car rental agencies. (Tr. 125, 218.) They discovered that the petitioner, Joshaway Davis, had rented a 1969, metallic blue Chevrolet Impala on February 12 and that shortly after noon on the day of the burglary, he had extended his rental contract and paid an additional $50 from an unusually large roll of bills and two rolls of quarters. (R. 10-12; Tr. 226.) The officers then drove past the address the contract listed as Davis' residence. The automobile was parked at that location. (Tr. 226.)

Sometime later, the officers drove out to Mile 25 and Richard Green showed them the safe. (Tr. 227.) Fibers of a reddish-brown material were found caught on the edge of an opening in the safe. (R. 11.) As mentioned above, Green had told the trooper that the man he talked with was wearing a brown or black mackinaw jacket. (R. 10.) Green described the man to the officers, and he expressed a belief that he could identify him upon sight. (Tr. 231, 280.) He doubted that he could identify the other man, however, as the man had been facing sideways. (Tr. 280.)

With the permission of Green's parents, the officers drove him to the Anchorage Police Station. (Tr. 230.) After approximately five minutes at the station, they showed him six photographs of adult, Negro males. (Tr. 230; A. 35a.) The room in which this photo showup occurred was 20 to 25 feet wide and 50 to 60 feet long. (Tr. 232.) Green examined the photographs for 30 seconds to one minute. (Tr. 234.) During that time, one of the two officers worked at his desk packaging evidence

pertinent to another case and the other officer did paperwork at his desk. (Tr. 233.) There were two other officers in the room at the time, but the record contains no indication that they did any work in connection with this burglary investigation. (Tr. 232.) After the photographs were handed to Green, no one else touched them or made any reference to them until Green picked Joshaway Davis' picture as depicting the man with whom he had spoken. (Tr. 234.) Before he identified the photograph, no one indicated to him that Davis was suspected of having committed the crime. (Tr. 231.) The photograph may have been up to 10 years old, and Green testified at trial that it was not exactly representative of the man's description because it did not show his mustache, a mustache that curved down at the edges of his mouth. (R. 10; A. 16a, 35a; Tr. 95-96, 283, 285.) Yet, Green also testified that he had no trouble selecting the picture. (A. 33a.) He was at the police station no more than half an hour. (A. 35a.)

Armed with search warrants the next day, Wednesday, February 18, the Anchorage police officers searched the car and the residence at the address listed on the car rental contract. (Tr. 239, 255; R. 11.) They found paint chips and a tire iron in the trunk of the automobile. Vacuum sweepings were taken from the trunk and from various places inside the car. (Tr. 256.) They arrested Davis inside the residence. (Tr. 139-140.) At a later time, one of the two officers compared the tires on the automobile with the tire tracks along the side road where the safe was found and concluded that the car had made the tracks. (Tr. 147-58.)

An F.B.I. paint analysis expert compared the paint chips found in the trunk of the automobile with paint samples taken from the safe and concluded that they

could have come from the same surface. (Tr. 160-80, 255-73.) The paint consisted of three layers, the top layer being black, the middle layer gray/green, and the bottom layer gray. (Tr. 173, 177-78.) The top two layers had a wrinkle finish. (Tr. 174, 177-78.) By microchemical testing, he discovered that the top two layers were enamel paint and that the bottom coat was a primer. (Tr. 175, 177-78.)

Another F.B.I. special agent, an expert in mineralogy, examined the vacuum sweepings from the trunk of the car and discovered that they contained safe insulation fibers composed of portland cement, diatomaceous earth, and vermiculite mica. (Tr. 192-212, 255-73.) He testified that he had never found this particular composition of materials anywhere but in safes. (Tr. 200.) By comparing the fibers with insulation that had been taken from the stolen safe, he found that they matched. (Tr. 202.) The expert stated that there are many types of safe insulations, and just by examining the fibers from the automobile, he was able to conclude, although not positively, that they had come from a Mosler safe. (Tr. 199, 206.) The stolen safe was a Mosler. (Tr. 103.)

On February 18, 1970, the same day that Davis was arrested, Richard Green picked him out of a seven-man lineup conducted at the Anchorage Police Station. (A. 35a; Tr. 140.) Shortly before the lineup occurred, an assistant district attorney and an assistant public defender who represented Davis at that time discussed how the lineup would be conducted. (Tr. 13, 19, 35, 45-46.) After seeing two or three of the participants, Davis' attorney had to leave for a court appearance, but he sent an investigator who worked for the Public Defender Agency, a 21-year-old college student, to observe the lineup. (Tr. 13-14, 30, 33.) Before dispatching the investigator, the

assistant public defender instructed him in what to look for and told him to take notes. (Tr. 38.) He also told the investigator to call him out of court if he deemed it necessary. (*Id.*) The attorney testified that he had no doubts about the investigator's ability to perform his assignment either before he was sent or after he reported back. (Tr. 40-42.) The trial judge was shown pictures of the lineup. (A. 42a; Tr. 10.) The record contains no indication that the lineup was suggestive.

Green testified that no one gave him any clue as to whom to pick out of the lineup. (A. 41a-42a.) Moreover, he stated that he was certain in his own mind about his identification of Davis as being the man with whom he had talked. (A. 42a-43a.) The only difference in appearance was in the aspect of wearing eyeglasses. (A. 42a.)

Richard Green picked another man out of the lineup as being the second man he had seen. However, as he did so, he told the police officers that he was not certain about the identification. (A. 43a.) The man had been arrested as a suspect, but when Green picked him, the officers informed him that the man could not have been with Davis that day. (A. 16a, 36a.)

Joshaway Davis was indicted on February 24, 1970, on one count of burglary and one count of grand larceny. (A. 1a-2a.) On October 6, 1970, a jury convicted him on both counts after deliberating for seven hours. (Tr. 427-29.)

During the voir dire, the prosecutor orally moved for a protective order preventing Davis from revealing the fact that Richard Green had been adjudicated a delinquent, and was at that time on probation, for the burglary of

two cabins. (A. 4a-5a, 15a.) The judge granted the motion because of Alaska R. Juv. P. 23:[2]

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

The constitutional propriety of this ruling represents the sole question before this Court.

Although Davis' defense counsel was precluded from revealing Green's delinquency adjudication and probationary status, he announced in his opening statement that the evidence would show that Green "was himself a suspect of this burglary and he believed himself to be a suspect of this burglary." (Tr. 94; *see also* Tr. 95-96, 396, 412.) The record, though, contains no indication that any police officer suspected Green of having any connection with the burglary. Indeed, one of the Anchorage police officers who took Green to the station for the photo-

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[2] An Alaska statute governing the admissibility of juvenile [illegible] reads as follows:

> No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

Alaska Stat. 47.10.080(g).

graph identification testified that he had never met the boy before driving out to his home and that he did not suspect him in any way. (A. 26a; Tr. 137-38.) As for Green believing himself to be a suspect, the following cross-examination constitutes his only testimony concerning the extent to which he was under pressure to identify someone in order to exonerate himself:

By Mr. Wagstaff:

Q. Mr. Green, as I understand it, you went down to the police station by yourself, or at least as far as your family is concerned, but in the company of 2 police officers, Investigator Gray and Investigator Weaver?

A. Yes, sir.

Q. Were you upset at all by the fact that this safe was found on your property?

A. No, sir.

Q. Did you feel that they might in some way suspect you of this?

A. No.

Q. Did you feel uncomfortable about this though?

A. No, not really.

Q. The fact that a safe was found on your property?

A. No.

Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

A. I thought they might ask a few questions is all.

Q. Did that thought ever enter your mind that you—the police might think that you were somehow connected with this?

MR. RIPLEY: I'm going to object to this, Your Honor, asked and answered. It's a minor paraphrase of questions that have been asked and answered.

THE COURT: It's paraphrased again. I'll allow it, just hopefully we don't get too deep in repeating it, but I think you are repeating the question. He may answer it if he can.

A. No, it didn't really bother me, no.

Q. Well, but–

A. I mean, you know, it didn't–it didn't come into my mind as worrying me, you know.

Q. That really wasn't–wasn't my question, Mr. Green. Did you think that–not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, not that you–

A. That come across my mind, yes, sir.

Q. That did not cross your mind?

A. Yes.

Q. So as I understand it you went down to the–you drove in with the police in–in their car from mile 25, Glenn Highway down to the city police station?

A. Yes, sir.

Q. And then went into the investigator's room with Investigator Gray and Investigator Weaver?

A. Yeah.

Q. And they started asking you questions about–about the incident, is that correct?

A. Yeah.

Q. Had you ever been questioned like that before by any law enforcement officers?

A. No.
(A. 33a-34a.)[3]

ARGUMENT

I

INTRODUCTION

The confrontation and compulsory process clauses of the sixth amendment guard against undue risks to an accurate verdict that attend certain limitations on a defendant's means of defending himself. These clauses are embodied in the fourteenth amendment right to due process of law.

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers v. Mississippi, ___ U.S. ___, ___, 35 L.Ed.2d 303, 308 (1972).

The trial judge limited Davis' means of defense when he prevented him from impeaching Green's credibility by fully cross-examining Green and revealing to the jury Green's juvenile delinquency adjudication and probation-

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[3]Davis states in his brief, "Counsel asked if he had ever been questioned before by law enforcement officers; his answer was no (A. 33-34)." (Petitioner's Brief at 10.) The specific question was, "Had you ever been questioned *like that* before by any law enforcement officers?" (A. 34a (emphasis added).) His negative response was not untruthful. The inquiry referred to being questioned as a prospective witness, not as a prospective accused. Green's juvenile record does not show that any of his testimony was untruthful.

ary status.[4] However, this impediment to Davis' defense is not of sufficient magnitude to have deprived him of due process of law. He was not denied "a fair opportunity to defend against the State's accusations." *Id.* This conclusion is true even though the jurors were somewhat misled concerning the reliability of Green's testimony.

Because cross-examination can reveal hidden defects in testimony, jurors may be misled concerning the testimony's reliability whenever cross-examination is restricted. They will always be misled to some degree when facts that impeach the testimony are kept from them. However, very few evidentiary rulings which keep an accused from fully cross-examining or frustrate him in disclosing impeaching facts rise to the level of constitutional error.[5] Even when the testimony that goes before the jury is critical to the government's case,

> the question . . . must be not whether one can somehow imagine the jury "in a better position," but whether . . . the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the [testimony].

California v. Green, 399 U.S. 149, 160-61, 26 L.Ed.2d 489, 498 (1970).

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[4]The only value further cross-examination of Green and disclosure of Green's juvenile record would have had to Davis is impeachment value. That Green himself committed the burglary would not have been a viable defense. *See* pp. 36-37 *infra; compare* Chambers v. Mississippi,____U.S.____, 35 L.Ed.2d 303 (1972).

[5]Our experience with the sixth amendment has taught us that it does not mean what it says. Despite the constitutional provision, it is not the applicable law that the accused is entitled in all circumstances to confront the witnesses against him.

Griswold, *The Due Process Revolution and Confrontation,* 119 U. Penn. L. Rev. 711, 728 (1971).

Green's testimony formed a substantial part of the State's case, and cross-examination in the area of Green's juvenile record would have placed the jurors "in a better position" to evaluate his testimony.[6] Nevertheless, Davis' jurors were not unduly misled concerning Davis' culpability because they still possessed "a satisfactory basis for evaluating the truth of the [testimony]." *Id.* The restriction placed on Davis' cross-examination of Green was not one of the "threats to a fair trial" against which "the Confrontation Clause was directed." *Bruton v. United States,* 391 U.S. 123, 136, 20 L.Ed.2d 476, 485 (1968).

II

HEARSAY CONFRONTATION CASES

Most confrontation cases involve hearsay.

Out-of-court statements are traditionally excluded because they lack the *conventional indicia of reliability;* they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

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[6]The protective order was broad enough to prevent Davis from calling other witnesses to establish Green's juvenile record. (A. 21a-22a); *cf.* Chambers v. Mississippi, *supra;* Webb v. Texas, ___ U.S. ___, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967). Had there been full cross-examination, however, it is not likely that other witnesses would have been needed. Nothing indicates that Green would have failed to reveal truthfully everything about his juvenile adjudication and probationary status had he been requested to do so.

Chambers v. Mississippi, supra at __, 35 L.Ed.2d at 311 (emphasis added). If hearsay is not excluded, a state defendant can be deprived of due process because of his inability to test its truth by the absent "conventional indicia of reliability."

> [C]ertain kinds of hearsay ... are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.

Bruton v. United States, supra at 138, 20 L.Ed.2d at 486 (Stewart, J., concurring) (emphasis in original); *see also id.* at 136 n.12, 20 L.Ed.2d at 485 n.12

> (Surely the suggestion is not that Pointer v Texas, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally.").

Because jurors may consider hearsay to be more trustworthy than circumstances show it to be, testing its accuracy by the absent "conventional indicia of reliability" can be considerably important both to the accused and to the accuracy of the verdict.[7] There is always a

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[7]Keeping a defendant from cross-examining or presenting evidence can deprive him of due process of law when a judge or an administrative tribunal is the fact finder.

The case of *In re* Oliver, 92 L.Ed. 682, 333 U.S. 257 (1948), involved a man who testified before a secret Ohio grand jury composed of a lone judge. Based upon the testimony of a subsequent witness, the judge held the man in contempt of court without giving him an opportunity to present a defense or cross-examine the other witness. This Court held that the defendant had been denied a constitutional opportunity to defend himself. By not having heard Oliver's defense, including a cross-examination of the other witness, the judge was not able to decide fairly Oliver's guilt or innocence.

chance that if the defendant were able to test the hearsay, the jurors would ascribe less weight to it. This possibility increases as the possibility that the missing "conventional indicia of reliability" would disclose hidden defects increases.

During the trial in *Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213 (1970), a witness named Shaw related an out-of-court statement supposedly made by his one-time cellmate Williams when Williams returned to their cell after being arraigned for murder. Shaw testified that he asked Williams how he had fared in court and Williams responded that if it were not for "Evans, we wouldn't be in this now." *Id.* at 77, 27 L.Ed. at 220. Williams was an alleged accomplice of Evans and was convicted of the

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In Brookhart v. Janis, 384 U.S. 1, 16 L.Ed.2d 314 (1966), Brookhart was convicted by a judge of forgery and uttering forged instruments. The State needed to present only prima facie proof of guilt and no cross-examination was allowed. This Court, after finding that Brookhart had not waived a full trial, held that the truncated proceedings denied him due process of law.

In Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L.Ed.2d 224 (1963), the New York Bar Association rejected Willner without a hearing. This Court found a denial of procedural due process, and in doing so stated,

> If the Court of Appeals based its decision on the ground that denying petitioner the right of confrontation did not violate due process, we also hold that it erred for the reasons earlier stated.

Id. at 106, 10 L.Ed.2d at 231; *cf.* Reilly v. Pinkus, 338 U.S. 269, 94 L.Ed. 63 (1949).

In Jenkins v. McKeithen, 395 U.S. 411, 23 L.Ed.2d 404 (1969), this Court reviewed the procedures of the Louisiana Labor Management Commission of Inquiry. Without giving Jenkins any opportunity to cross-examine or to compel the attendance of witnesses, the Commission decided whether he had committed a crime, the determination carrying various adverse consequences. This Court found a denial of due process.

murders before Evans was tried. He had never been cross-examined about this hearsay statement, and he was not called at Evans' trial. The Georgia trial court allowed the hearsay under a Georgia statute that admits statements made by a co-conspirator, even if they are made after the co-conspirator's arrest. This Court concluded that the jurors were not unconstitutionally misled concerning Evans' culpability even though at no time was the hearsay ever tested by any of the "conventional indicia of reliability," *i.e.*, cross-examination, demeanor observation, and an oath. *Chambers v. Mississippi, supra* at __, 35 L.Ed.2d at 311.

The trustworthy appearance of the hearsay indicated that if Williams actually made the statement, neither cross-examination nor an oath would have changed its substance, nor would demeanor observation by Chambers' jurors have lessened its impact on their minds.

> First, this statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against

> his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Dutton v. Evans, supra at 88-89, 27 L.Ed.2d at 227.[8]

The trustworthiness of the hearsay was dubious, though, as to whether Williams actually made the statement. There existed "serious doubt . . . whether the conversation which Shaw related ever took place." *Id.* at 87 n.18, 27 L.Ed.2d at 226 n.18. However, the jurors were made aware of this "serious doubt." Williams'

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[8]The fact that Evans could have called Williams to the stand added to the trustworthiness of the hearsay. His failure to do so indicated that the statement was made and that it was accurate, the logical assumption being that Evans would have called Williams if cross-examination would have shown the hearsay to be less incriminating than it appeared.

The force of this assumption is diminished somewhat because Evans' counsel chose not to subpoena Williams because of a belief that Williams would stand on his right not to incriminate himself and refuse to answer questions about the alleged statement. Dutton v. Evans, 400 U.S. 74, 102 n.4, 27 L.Ed.2d 213, 235 n.4 (1970) (Marshall, J., dissenting). However, because there was some possibility that Williams would have answered, *id.* at 102, 27 L.Ed. at 234-35 (Marshall, J., dissenting), the reliability of the hearsay was somewhat enhanced by the fact that Evans could have brought him to the trial.

With respect to whether Williams made the statement, this Court stated the following:

> Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interest of his client.

Id. at 88 n.19, 27 L.Ed.2d at 226-27 n.19.

testimony on this point was not sufficiently important to Evans' defense to cause a denial of his constitutional right of confrontation.

One of the reasons why the restrictions on Evans' defense were not unconstitutional stems from the fact that as hearsay becomes less incriminating in the jurors' minds and less important in their deliberations, the consideration of whether the jurors are misled concerning the testimony's reliability decreases in importance.[9] *See, e.g., Frazier v. Cupp,* 394 U.S. 731, 22 L.Ed.2d 684 (1969); *cf. Namet v. United States,* 373 U.S. 179, 10 L.Ed.2d 278 (1963). In light of the fact that the jurors learned of the "serious doubt" and in light of the mass of other incriminating evidence that the jury heard, this Court concluded that the hearsay was not "evidence in any sense 'crucial' or 'devastating,' " but rather it was "of peripheral significance at most." *Dutton v. Evans, supra* at 87, 27 L.Ed.2d at 226.

Conversely, the less a jury is misled about the reliability of hearsay testimony, the greater can be the testimony's impact. Even "crucial" or "devastating" hearsay may be admitted into evidence if the lack of full and effective cross-examination, for example, does not cause the jury to be too misled.

California v. Green, supra, is a case in which the hearsay was so important that even with it, there was some doubt that the conviction was based on legally

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[9]When considering what effect additional confrontation would have had on the jurors' minds, the standard to measure against is the average jury. *See* Schneble v. Florida, ___ U.S.___, ___, 31 L.Ed.2d 340, 345 (1972).

sufficient evidence.[10] A juvenile, who had been arrested eleven days earlier for selling marijuana, testified at Green's preliminary hearing that Green had supplied him with marijuana. At Green's trial for furnishing narcotics to a minor, the juvenile was called as the principal State's witness, and after he professed a lack of memory, his prior testimony was introduced as substantive evidence under a prior inconsistent statement exception to the hearsay rule.

Green's counsel extensively cross-examined the juvenile at the preliminary hearing, and this Court stated as dictum that the hearsay would have been admissible as evidence against Green even if the State had been unable to produce the juvenile at trial.[11] *Id.* at 165, 26 L.Ed.2d

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[10] Due process not only protects against inaccurate verdicts by prohibiting serious limitations on a person's means of defending himself, it does

> not permi[t] a conviction based on no evidence, Thompson v City of Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960); Nixon v Herdon, 273 US 536, 71 L Ed 759, 47 S Ct 446 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. In re Oliver, supra; Turner v Louisiana, 379 US 466, 13 L Ed 2d 424, 85 S Ct 546 (1965).

California v. Green, 399 U.S. 149, 186 n.20, 26 L.Ed.2d 489, 513 n.20 (1970) (Harlan, J., concurring); *see also id.* at 163 n.15, 26 L.Ed.2d at 500 n.15 ("While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable basis is totally lacking, see Thompson v Louisville"); *cf. In re* Winship, 397 U.S. 358, 25 L.Ed.2d 368 (1970).

[11] The juvenile first revealed that Green was his supplier four days after the juvenile was arrested. This hearsay statement to the police was also introduced. At the trial, the boy's professed lack of memory prevented Green's counsel from effectively cross-examining the juvenile concerning this statement. This Court

at 501. The more trustworthy hearsay appears, the less likely it is that the absent cross-examination or demeanor observation would have cast doubt on the reliability of the hearsay or that the absent oath would have induced the declarant to make a different statement. The prior cross-examination and oath clothed the juvenile's prior testimony in sufficient "indicia of 'reliability' " to justify a conclusion that the jurors would not have been unduly misled concerning the reliability of the hearsay even if they had never seen and heard the juvenile. *Id.* at 161, 26 L.Ed.2d at 499; *see also Mancusi v. Stubbs*, ___ U.S. ___, ___, 33 L.Ed.2d 293, 303 (1972)

> (Since there was an adequate opportunity to cross-examine Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient "indicia of reliability" and afforded a "trier of fact a satisfactory basis for evaluating the truth of the prior statement," . . . .);

Mattox v. United States, 156 U.S. 237, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witness admissible).

The juvenile's testimony at trial cast considerable doubt on the trustworthiness of his prior testimony, but because the jurors heard the trial testimony, they were not misled about this aspect of the hearsay's reliability. Also, the trial testimony lessened the hearsay's incriminatory sting. Thus, just as it was significant in *Dutton v. Evans* that the jurors knew of the likelihood that Williams

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remanded to California for a determination of whether the introduction of this hearsay into evidence was constitutional error, and, if so, whether the error was harmless because of the admissible preliminary hearing testimony. California v. Green, *supra* at 168-70, 26 L.Ed.2d at 503-04; *cf.* note 19 *infra*.

never made the statement to Shaw, it was significant that the jurors in *California v. Green* heard the juvenile tell the "different, inconsistent story." *California v. Green, supra* at 159, 26 L.Ed.2d at 497.

Hearsay need not be more trustworthy than untrustworthy to pass constitutional muster. In *Nelson v. O'Niel*, 402 U.S. 622, 29 L.Ed.2d 222 (1971), a police officer testified that Nelson's co-defendant made an unsworn, oral confession to him that implicated Nelson as his confederate. This confession is the type of hearsay that is so untrustworthy and so damaging that even though the jurors were instructed not to consider it in assessing Nelson's guilt, had the co-defendant not been cross-examined, the jurors would have been unconstitutionally misled concerning Nelson's complicity. *E.g., Roberts v. Russell*, 392 U.S. 293, 20 L.Ed.2d 1100 (1968); *Bruton v. United States, supra.* As it was, the co-defendant took the stand, denied having made the alleged confession, and denied the accuracy of the assertions comprising it. Because the co-defendant's testimony adequately informed the jurors of the hearsay's reliability and greatly reduced the impact of the hearsay, Nelson's right of confrontation was not abridged.

III

NON-HEARSAY CONFRONTATION CASES

Confrontation problems are not confined to hearsay cases. Non-hearsay testimony that is not tested by full and effective cross-examination can critically mislead a jury concerning the defendant's culpability.

In *Chambers v. Mississippi, supra,* Chambers sought to show that a man named McDonald murdered the police officer. One of McDonald's life-long friends testified that he saw McDonald shoot the officer, and another witness

testified that he observed McDonald with a pistol immediately after the shooting. Chambers called McDonald to the stand and elicited the fact that McDonald had signed a sworn confession.

On cross-examination, the prosecutor brought out that McDonald had repudiated the confession prior to trial and that he still repudiated it. McDonald even furnished an alibi. Under Mississippi law, Chambers was unable then to treat McDonald as an adverse witness and subject his "damning repudiation and alibi to cross-examination." *Id.* at ___, 35 L.Ed.2d at 308.

Cross-examination would have been extremely informative to the jurors. They would have learned facts that both severely impeached McDonald's testimony and provided strong affirmative support for Chambers' defense that McDonald committed the crime. Also, considering the nature of these facts, serious hidden defects in McDonald's testimony may well have surfaced during cross-examination.

A man named Sam Hardin testified

> that, on the night of the shooting, he spent the late evening hours with McDonald at a friend's house after their return from the hospital and that, while driving McDonald home late that night, McDonald stated that he shot Liberty. The State objected to the admission of this testimony on the ground that it was hearsay. The trial court sustained the objection.

Id. at ___, 35 L.Ed.2d at 307. The trial court then ordered the jury to disregard this testimony. *Id.* at ___ n.4, 35 L.Ed.2d at 307 n.4.

Outside the jury's presence, a man named Berkley Turner

recounted his conversations with McDonald while they were riding with James Williams to take Chambers to the hospital. When asked whether McDonald said anything regarding the shooting of Liberty, Turner testified that McDonald told him that he "shot him." Turner further stated that one week later, when he met McDonald at a friend's house, McDonald reminded him of their prior conversation and urged Turner not to "mess him up."

Id. at ___, 35 L.Ed.2d at 307. Because of another hearsay objection, the judge refused to allow the jury to hear this evidence.

A third witness was McDonald's neighbor.

They had been friends for about 25 years. Although Carter had not been in Woodville on the evening of the shooting, he stated that he learned about it the next morning from McDonald. That same day he and McDonald walked out to a well near McDonald's house and there McDonald told him that he was the one who shot Officer Liberty. Carter testified that McDonald also told him that he had disposed of the .22-caliber revolver later that night. He further testified that several weeks after the shooting he accompanied McDonald to Natchez where McDonald purchased another .22 pistol to replace the one he had discarded.[5] The jury was not allowed to hear Carter's testimony. Chambers urged that these statements were admissible, the State objected, and the court sustained the objection.

Id. at ___, 35 L.Ed.2d at 307.08.[12] "The trial court did

[12] 5. A gun dealer from Natchez testified that McDonald had made two purchases. The witness' business records indicated that McDonald purchased a nine-shot .22-caliber revolver about a year prior to the murder. He purchased a different style .22 three weeks after Liberty's death.

Chambers v. Mississippi, *supra* at ___ n.5, 35 L.Ed.2d at 307 n.5.

not state why it was excluding the evidence but the State Supreme Court indicated that it was excluded as hearsay." *Id.* at ___ n.6, 35 L.Ed.2d at 308 n.6.

McDonald's renunciation of his confession, reinforced by his alibi, was testimony "seriously adverse to Chambers" as it squarely disputed Chambers' defense that McDonald had committed the crime, and this testimony went to the jury without any cross-examination.[13] *Id.* at ___, 35 L.Ed.2d at 310. Chambers

> was not allowed to test the witness' recollection, to probe into the details of his alibi, or to "sift" his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief.

Id. at ___, 35 L.Ed.2d at 308-09. Moreover, McDonald's testimony went to the jurors without their being able to consider the extremely impeaching and exculpatory evidence that the three witnesses were prepared to present. Consequently, the jurors were considerably misled concerning Chambers' culpability.

There was no acceptable justification for this damage to the "integrity of the fact finding process." *Id.* at ___, 35 L.Ed.2d at 309. This Court noted that the "voucher" or "party witness" rule that barred cross-examination "bears little present relationship to the realities of the

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[13] Chambers' ability to question McDonald on direct was no substitute for cross-examination. He was "restricted in the scope of his direct examination by the [voucher] rule's corollary requirement that the party calling the witness is bound by anything he might say." Chambers v. Mississippi, *supra* at ___, 35 L.Ed.2d at 310.

criminal process,"[14] *id.* at ___, 35 L.Ed.2d at 309, and that the hearsay rules that barred the three witness' testimony served no "valid State purpose" because of the fact that McDonald's hearsay statements which the witnesses would have related

> were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.

Id. at ___, 35 L.Ed.2d at 311-12. This Court

> conclude[d] that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

Id. at ___, 35 L.Ed.2d at 313.

McDonald was not cross-examined at all and the jurors never learned of facts that severely impeached his testimony, but even when there is some cross-examination and no known impeaching facts are kept from the jurors, they still may be seriously misguided concerning non-hearsay testimony.[15] In *Smith v. Illinois*,

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[14] This Court noted that Mississippi did not seek "to defend the rule or explain its underlying rationale," Chambers v. Mississippi, *supra* at 35 L.Ed.2d at 310, and that

> [t]he "voucher" rule has been condemned as archaic, irrational, and potentially destructive of the truth gathering process.

Id. at __ n.8, 35 L.Ed.2d at 309 n.8.

[15] Jurors can be seriously misled concerning the reliability of non-hearsay testimony even when *no* cross-examination is forbidden and *no* fact that impeaches the testimony is kept from the jury. Some eyewitness identifications are grounded on such suggestive circumstances that no cross-examination or other impeachment can adequately alert jurors to their unreliability. If

390 U.S. 129, 19 L.Ed.2d 956 (1968),

> the principal witness against the petitioner was a man who identified himself on direct examination as "James Jordan." This witness testified that he had purchased a bag of heroin from the petitioner in a restaurant with marked money provided by two Chicago police officers. The officers corroborated part of this testimony, but only this witness and the petitioner testified to the crucial events inside the restaurant, and the petitioner's version of those events was entirely different. The only real question at the trial, therefore, was the relative credibility of the petitioner and this prosecution witness.
>
> On cross-examination this witness was asked whether "James Jordan" was his real name. He admitted, over the prosecutor's objection, that it was not. He was then asked what his correct name was, and the court sustained the prosecutor's objection to the question. Later the witness was asked where he lived, and again the court sustained the prosecutor's objection to the question.

Id. at 130-31, 19 L.Ed.2d at 958 (footnotes omitted). This Court commented as follows:

> In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting

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jurors learn of an identification that is important to the State's case and it is possible that they are greatly misled concerning its reliability, due process is denied. *E.g.*, Neil v. Biggers, ___ U.S. ___, 34 L.Ed.2d 401 (1972); *see also* California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 (Harlan, J., concurring).

> point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131, 19 L.Ed.2d at 959 (footnote omitted).

After observing, " 'It is the essence of a fair trial that reasonable latitude be given the cross-examiner,' " this Court found a denial of confrontation. *Id.* at 132, 19 L.Ed.2d 959, quoting from *Alford v. United States*, 282 U.S. 687, 692, 75 L.Ed. 624, 627 (1931). No reason was given for limiting the cross-examination, *Smith v. Illinois*, *supra* at 133 n.8, 19 L.Ed.2d at 960 n.8; the informer's testimony was critical to the State's case; persons who make controlled narcotic purchases are, in general, extremely vulnerable to cross-examination; and Smith's cross-examination was "emasculated."[16] *Id.* at 131, 19

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[16] The government's desire to shield informers can create constitutional problems not only when an informer takes the stand, but when an accused is kept from cross-examining a witness about an informer. For example, in McCray v. Illinois, 386 U.S. 300, 18 L.Ed.2d 62 (1967), the question was whether the Illinois trial judge violated the accused's right of confrontation at an evidentiary suppression hearing when he prevented cross-examination of police officers concerning the identity of a "reliable informant."

> The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.

L.Ed.2d at 959; *cf.* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99, 135 (1972) ("[P]ermitting a witness to testify under an alias not only interferes with the attack on his credibility, but smacks as well of the despised 'anonymous informant.' ").

In a concurring opinion, Justice White observed that the personal safety of a witness can justify immunity from answering questions on cross-examination, but because "the State gave no reasons justifying the refusal to answer a quite usual and proper question," he joined in "the Court's judgment and its opinion." *Smith v. Illinois, supra* at 134, 19 L.Ed.2d at 960 (White, J., concurring).

The decision in *Smith v. Illinois* relies on *Alford v. United States, supra.* Alford was convicted of using the mails to defraud.

> In the course of the trial the government called as a witness a former employee of petitioner. On direct examination he gave damaging testimony with respect to various transactions of accused, including conversations with the witness when others were not present, and statements of accused to salesmen under his direction, whom the witness did not identify. Upon cross-examination questions seeking to elicit the witness' place of residence were

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Id. at 313, 18 L.Ed.2d at 72. In light of these indicia of reliability and the need for concealing the informer's identity, this Court found satisfactory confrontation.

Also, a jury may be unconstitutionally misled concerning an accused's culpability when the informer privilege is used to prevent him from calling a police informer. Branzburg v. Hayes,___ U.S. __ , 33 L.Ed.2d 626 (1972) ("[T]heir identity cannot be concealed from the defendant when it is critical to his case."); McCray v. Illinois, *supra.*

> excluded on the government's objection that they were immaterial and not proper cross-examination.

Id. at 688, 75 L.Ed. at 626. The federal trial judge sustained the objection even though defense counsel "had been informed that the witness was then in the custody of the federal authorities . . . ." *Id.* at 690, 75 L.Ed. at 627. It was quite possible that cross-examination would have shown

> that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.

Id. at 693, 75 L.Ed. at 628.

The danger was great that the *Alford* jury was unfairly misled concerning the testimony's reliability and the reason for limiting the cross-examination—to protect the witness from the discredit that attends a showing of any criminal charge—was weak, the witness being an adult in custody. Also, the testimony was "damaging." *Id.* at 688, 75 L.Ed. at 626. Accordingly, in what appears to be a supervisory rather than a constitutional ruling, this Court held that the restriction on cross-examination "was an abuse of discretion and prejudicial error."[17] *Id.* at 694,

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[17] The Court in Smith v. Illinois viewed the error in *Alford* as being of constitutional magnitude. Smith v. Illinois, 390 U.S. 129, 133, 19 L.Ed.2d 956, 960 (1968). The Court in *Alford* did say, "Cross-examination of a witness is a matter of right," and, "It is the essence of a fair trial that reasonable latitude be given the cross-examiner. . . ." Alford v. United States, 282 U.S. 687, 691-92, 75 L.Ed. 624, 627-28 (1931). Also, one of the cases cited in *Alford* mentions the sixth amendment, although it does so by saying, "This error involves no question under the Sixth Amendment of the Constitution." Furlong v. United States, 10 F.2d 492, 494 (8th Cir. 1926), cited in Alford v. United States, *supra* at 692,

75 L.Ed. at 629; *cf. Gordon v. United States*, 344 U.S. 414, 97 L.Ed. 447 (1953).

IV

LIMITING DAVIS' CROSS-EXAMINATION OF GREEN DID NOT SIGNIFICANTLY MISLEAD THE JURY CONCERNING THE RELIABILITY OF GREEN'S TESTIMONY.

Confrontation cases center around the extent to which the curtailment of the accused's means of defending himself caused the jurors to be misled concerning his guilt [illegible]nce.[18] The two components of this determina-

75 L.Ed. at 627. However, no other authority cited in *Alford* even mentions the sixth amendment, and a civil case is cited to the opinion's language "Cross-examination of a witness is a matter of right." *Cf.* California v. Green, *supra* at 179 n.14, 26 L.Ed. at 509 n.14 (Harlan, J., concurring) ("Alford v. United States . . . (right to cross-examine not treated as a denial of confrontation)."); Glass v. United States, 315 U.S. 60, 86 L.Ed. 680 (1942) ("The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. Alford v. United States"). Nevertheless, the possibility that the jury was dangerously misled appears even stronger in *Alford* than in *Smith*. The witness' testimony in *Alford* was damaging and the jurors never learned that the critical witness' testimony might have been

> biased becaused given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.

Alford v. United States, *supra* at 693, 75 L.Ed. at 628. This is the same type of bias that makes co-defendant hearsay confessions so untrustworthy that even instructions to disregard usually will not suffice. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968).

[18] This is also true of the compulsory process cases. Thus, to the extent that the instant case carries compulsory process overtones, the ultimate legal analysis is the same. *See* note 6 *supra*.

tion are the damaging nature of the unconfronted testimony and the degree to which the jurors were misled concerning the testimony's reliability.[19] Although Green's testimony was damaging, the jury that convicted Davis was not unduly misled concerning its reliability.

Green's testimony was immediately subjected to cross-examination which was limited only in the area of his juvenile record; he rendered his testimony under oath in

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[19] In Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284 (1969), this Court stated that a constitutional *Bruton*-type error had occurred even though the harmful impact of the co-defendant's confession was so slight that the error was harmless beyond a reasonable doubt, a fact that saved the conviction. *Harrington* suggests that at least in the realm of *Bruton*, the question of whether a constitutional error has occurred is answered by looking solely at the extent to which the jurors were misled concerning the reliability of the unconfronted testimony, not looking at all at the damaging impact of the testimony. That is, the inquiry does not expand to consider whether the jurors were misled concerning the accused's culpability.

Harrington preceded Dutton v. Evans, *supra*, the first confrontation case to dwell on the aptness of the testimony's damaging impact when a determination of error needs to be made. Also, this Court stated in the *Bruton* harmless error case of Schneble v. Florida, *supra*, "The admission into evidence of these statements, therefore, was *at most* harmless error." *Id.* at ___, 31 L.Ed.2d at 345 (emphasis added). In Brown v. United States, ___ U.S. ___, 36 L.Ed.2d 208 (1973), this Court did not have to consider whether the introduction of the co-defendant's confession constituted error because of the fact that the Solicitor General conceded that the confession was improperly admitted under *Bruton*. *See also* Frazier v. Cupp, 394 U.S. 731, 22 L.Ed.2d 684 (1969) (no error because co-defendant's confession not sufficiently placed before the jury); *cf.* Bruton v. United States, *supra* at 127-28, 20 L.Ed.2d at 480 ("Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination . . . .").

surroundings designed to impress him "with the solemnity of his statements"; and he was "available in order that his demeanor and credibility [could] be assessed by the jury."[20] *Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 311; *see also California v. Green, supra* at 158, 26 L.Ed.2d at 497. Therefore, all of the "conventional indicia of reliability" safeguards embodied in the confrontation clause—full and effective cross-examination, a courtroom oath, and the jury's ability to observe demeanor—were undiminished with the one exception of cross-examination in the area of Green's juvenile record.[21] *Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 311. In spite of the fact that cross-examination was limited in this one area and the jurors never learned of Green's juvenile record, they possessed an adequate foundation for fairly determining Davis' culpability.

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[20] Also, Davis was present when Green testified. One of the basic rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353 (1970); *see also* Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674 (1934). Moreover, Green accused Davis in his presence. The face-to-face aspect of confrontation was considerably important to the framers of the sixth amendment. Larkin, *The Right of Confrontation: What Next?*, 1 Texas Tech. L. Rev. 67, 69-70 (1969); *see generally* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381 (1959).

[21] The present case should be contrasted with Dutton v. Evans, *supra*, in which the right of confrontation was not violated even though not one of these confrontation safeguards existed to any extent.

A. Further Cross-Examination by Davis Would Not Have Disclosed Significant Hidden Defects in Green's Testimony.

Dean Wigmore characterized cross-examination as "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, *Evidence* §1367, at 29 (3d ed. 1940). Any curtailment of cross-examination may result in a jury's being misled in determining the testimony's reliability. When cross-examination is completely denied or emasculated, this possibility is oftentimes quite real.[22] However, the possibility that the denied cross-examination would have revealed hidden defects in the testimony diminishes with increased cross-examination.

Because Green's juvenile record is so minimally impeaching and because cross-examination was so extensive, it seems highly unlikely that cross-examining Green about his juvenile record would have revealed any significant hidden defects. In other words, it appears that Green's testimony would not have suffered more by full cross-examination than it would have by disclosure of his juvenile record through another witness.

If a witness has a motive to testify as he did, cross-examination on the subject of his motive quite likely will disclose hidden defects in the testimony. However, the fact that Green was on probation does not indicate that he had a meaningful motive that may have colored his testimony. Perhaps Green was more likely to benefit some time in the future from having helped the police than he would have been had he never been

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[22] This is especially true when there has been a large-scale denial of cross-examination and the defendant is prevented from inquiring into known facts that severely impeach the testimony's plausibility. *See* Chambers v. Mississippi, *supra;* Alford v. United States, *supra.*

apprehended by legal authorities, but such a vague possibility of benefit is hardly significant impeaching evidence. As for a possible immediate benefit, Green's juvenile record does not indicate that he was receiving any favors for his help. There is no indication that Green testified to stave off a probation revocation or other adverse modification of his judgment. *Cf.* Alaska Stat. 47.10.100(a). Helping the police solve crimes and convict criminals was obviously not one of his conditions of probation.[23] Although Green may have faced a probation revocation had he been involved in the Polar Bar burglary, the record clearly demonstrates that full cross-examination would not have uncovered that Green was in any danger of being accused of the burglary.

The only evidence linking Green to the crime was the safe's having been found near his parents' property. It is highly unlikely that a burglar would dispose of a stolen safe alongside a road near his house. Green's old pickup had not brought the safe there. (A. 29a-30a.) Nothing in the record indicates that the police even suspected Green of having committed the burglary. The only officer to testify on this subject specifically stated that he did not suspect Green. (A. 26a; Tr. 137-38.) None of Green's actions indicated guilt. Green testified that although it "came across [his] mind" "that there was a possibility that the police might somehow think that [he] had something to do with" the safe, he was not "upset at all by the fact that the safe was found on" his parents' property. (A. 33a-34a.)

The strength of Green's testimony further shows that cross-examination would not have revealed any hidden defects in it. Green's story to the trooper, to the

[23] The State will furnish the conditions of probation, and even Green's entire juvenile file, if this Court so requests.

Anchorage police officers, and to the jurors, a story that did not waiver or vary, was so amply corroborated that it would have been extremely trustworthy evidence even if Green had had a strong motive either to fabricate or to hastily make an identification and then to stick to it. It was so corroborated that Green's credibility was not a serious issue in this case, and would not have been a serious issue even if there had been full cross-examination. *Compare e.g., Chambers v. Mississippi, supra; Smith v. Illinois, supra; Alford v. United States, supra.*

After Green told the trooper about seeing the metallic blue, late model Chevrolet sedan at approximately noon on the day of the burglary, the city police officers discovered that Davis had rented a 1969, metallic blue Chevrolet Impala four days before the burglary and had extended his rental contract and paid an additional $50 from an unusually large roll of bills and two rolls of quarters.[24] (R. 10-12.) Paint chips and safe insulation fibers which obviously came from the stolen safe were found in the trunk of the automobile when it was searched outside Davis' residence two days after the burglary. (Tr. 166-80, 192-212, 239, 255-73.) Nothing in the record indicates that Green's description to the police officers of the man he talked with failed to match Davis' appearance. Green told the trooper that the man was wearing a brown or black mackinaw jacket, and one of the Anchorage police officers later found fibers of a

[24] The jury never learned of the way Davis paid for the extended rental contract, but the fact that they never learned is irrelevant to an assessment of the trustworthiness of the testimony for the purpose of determining whether additional cross-examination might have revealed hidden defects.

reddish-brown material caught on the safe.[25] (R. 10-11; *see also* A. 31a.) The rental car's snow tires matched the set of tracks located where the safe was found. (Tr. 147-58.)

The record is replete with evidence that the photograph and lineup identifications were not suggestively induced. (A. 33a, 35a, 41a-43a; Tr. 11-48, 232-34.) Before Green picked Davis' photograph, no one indicated to him in any way that Davis was suspected of having committed the crime. (Tr. 231.) He had no trouble selecting the photograph even though it was perhaps 10 years old and differed from Davis' appearance at the time of his arrest in that it did not show him with a mustache. (R. 10; A. 16a, 33a, 35a; Tr. 95-96, 283, 285.)

The day after the photo showup, an assistant public defender, who was Davis' attorney at the time, helped organize the lineup, and an investigator for the Public Defender Agency, who had been instructed by the attorney in what to look for, observed the lineup itself. (Tr. 13-14, 19, 28-48, 59.) Photographs of the lineup were shown to the trial judge. (A. 42a; Tr. 10.) Green testified that no one gave him any clue concerning whom to select from the lineup, and he said that he was certain in his own mind about his selection. (A. 41a-43a.)

Green's photograph, lineup, and in-court identifications of Davis were grounded on an excellent "prior opportunity to observe."[26] *United States v. Wade*, 388

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[25] The jury never learned about the fibers that were caught on the safe. *See* note 24 *supra*.

[26] The lineup was not unconstitutionally conducted. It preceded the indictment by several days. (A. 1a-2a, 35a; Tr. 140); Kirby v. Illinois, 406 U.S. 682, 32 L.Ed.2d 411 (1972). Also, even if the lineup were considered a "critical stage" of Davis' proceedings and he did not waive his right to be represented, he was constitutionally represented at the lineup even though his representative was not an attorney.

U.S. 218, 241, 18 L.Ed.2d 1149, 1165 (1967). Green closely observed Davis when they first met along the side road. It was daylight and they spoke from a distance of only three feet. (A. 29a-40a.) There was no "discrepancy between [Green's pre-photo-showup] description and the defendant's actual description." *United States v. Wade, supra* at 241, 18 L.Ed.2d at 1165. Green never failed "to identify the defendant on [any] occasion." "[T]he lapse of time between the alleged [encounter] and the [photograph and] lineup identification[s]" *id.*, was merely one and two days respectively. (A. 42a-43a.) "[T]hose facts

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This Court has given certain suspects the right to counsel at a lineup to afford them an opportunity to "reconstruct the manner and mode of lineup identification for judge or jury at trial." United States v. Wade, 388 U.S. 218, 230, 18 L.Ed.2d 1149, 1159 (1967). In so doing, the Court noted that

> neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.

Id. A lawyer's schooling, of course, suits him for the task of detecting suggestive influences, but his role in performing this task is not as professionally demanding as is his role at other "critical" stages, such as at the trial itself.

This Court indicated in *Wade* that the right to have an attorney present at a "critical" lineup may not always exist. For example, this Court said,

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestions at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical."

Id. at 239, 18 L.Ed.2d at 1164. The investigator for the Public Defender Agency would have been able to adequately reconstruct the lineup at trial if Davis had desired him to do so.

which . . . are disclosed concerning the conduct of [the photo showup and] the lineup" contain absolutely no indication that any impermissible suggestion occurred. *United States v. Wade, supra* at 241, 18 L.Ed.2d at 1165; *cf.* note 15 *supra.*

In addition to all of these facts demonstrating the trustworthiness of Green's testimony, there exists the additional important fact that Green gave his testimony under oath and before the jury. Also, the facts that Green was extensively cross-examined and that he was circumspectly interrogated about the possible motive further show that full cross-examination would not have disclosed any significant hidden defects in his testimony.[27] The following language from the Alaska Supreme Court

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[27] Green's testimony is considerably more trustworthy than are most dying declarations. The unreliability of dying declarations has long been recognized:

> The history of criminal trials is replete with instances where witnesses even in the agonies of death have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts . . . .

Carver v. United States, 164 U.S. 694, 697, 41 L.Ed. 602, 603 (1897); *see also* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1436-37 (1966). Yet this Court has consistently voiced blanket approval of the dying declaration exception to the hearsay rule. Dutton v. Evans, *supra* at 80, 27 L.Ed.2d at 222; California v. Green, *supra*, at 182, 26 L.Ed.2d at 511 (Harlan, J., concurring); Pointer v. Texas, 380 U.S. 400, 407, 13 L.Ed.2d 923, 928 (1965); Snyder v. Massachusetts, *supra* at 107, 78 L.Ed. at 679; Dowdell v. United States, 221 U.S. 325, 330, 55 L.Ed. 753, 757 (1911); Kirby v. United States, 174 U.S. 47, 61, 43 L.Ed. 890, 896 (1899); Robertson v. Baldwin, 165 U.S. 275, 282, 41 L.Ed. 715, 717 (1897); Mattox v. United States, 156 U.S. 237, 243-44, 39 L.Ed. 409, 411 (1895); Mattox v. United States, 146 U.S. 140, 151-52, 36 L.Ed. 917, 921-22 (1892).

opinion discusses this one part of Green's cross-examination:

> [W]hile the judge did not permit questions directly disclosing the fact that the juvenile had a prior record, our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the juvenile in considerable detail concerning the possibility of bias or motive. Council [sic] alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension. The juvenile responded that he felt no anxiety or apprehension about the safe being discovered near his home. While this denial was possibly self-serving, the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the juvenile and pass on his credibility.

(A. 60a.)

B. Green's Juvenile Record Does Not Substantially Impeach Green's Testimony.

The jury was somewhat misled concerning Green's credibility simply by not having heard about his juvenile record. However, this inroad on the integrity of the fact-finding process did not deprive Davis of due process of law.[28] This conclusion is true even though Green's testimony substantially added to the State's case.

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[28] In Giles v. Maryland, 385 U.S. 66, 17 L.Ed.2d 737 (1967), a Maryland juvenile records secrecy law was used to keep the jury from hearing evidence that impeached a rape victim. This Court remanded to the Maryland Supreme Court for a reconsideration of

Burglary is a larcenous crime. The fact that Green had been adjudicated a delinquent for committing two burglaries was relevant to his veracity at trial, but the relevancy was quite weak. It may be said that, in general, a person who has committed two burglaries is less believable than a person who has not. However, when there is no motive to prevaricate, it does not seem much more likely that a burglar, as opposed to a non-burglar, would perjure himself in order to help convict someone he does not know.

Davis' primary allegation is that Green's juvenile record impeaches his testimony because it shows that Green possessed an interest in quickly foisting the blame onto someone else and keeping it there. As discussed above, however, in reference to what possible hidden doubts further cross-examination might have cast on Green's testimony, Green's juvenile record does not indicate that a meaningful motive existed. *See* pp. 35-37 *supra.* Moreover, Green's testimony is so amply corroborated that even a strong motive would not have seriously impeached his credibility.

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various evidentiary rulings, including the juvenile secrecy rulings. The dissenting opinion contains the following language:

> My Brother White does not suggest, as I think he cannot, that any of the rulings which he suspects to have been erroneous were deficient under any known federal standard.

Id. at 113, 17 L.Ed.2d at 767 (Harlan, J., dissenting).

V

THE STRONG PURPOSES BEHIND ALASKA'S JUVENILE RECORDS SECRECY RULE FURTHER SHOW THAT DAVIS' TRIAL WAS FUNDAMENTALLY FAIR.

Whether or not the jurors were misguided concerning Davis' culpability is not the only consideration in judging the fairness of his trial. It is relevant to consider the underlying rationale for the judge's refusal to allow full cross-examination and disclosure of Green's juvenile record.

A. Hearsay and Non-Hearsay Cases Which Consider the Underlying Rationale for Limiting the Accused's Defense

This Court in *Chambers v. Mississippi, supra,* stressed the fact that the "voucher" rule which foreclosed all cross-examination of McDonald "bears no present relationship to the realities of the criminal process." *Id.* at __, 35 L.Ed.2d at 309. As for the hearsay rulings that foreclosed bringing McDonald's prior confessions and admissions to the jury, this Court noted that they served no "valid state purpose." *Id.* at ___, 35 L.Ed.2d at 311; *see also Smith v. Illinois, supra* (no reason for the restriction on cross-examination); *Alford v. United States, supra* (same); *cf. Brooks v. Tennessee,* 406 U.S. 605, 32 L.Ed.2d 358 (1972).

In *Mattox v. United States,* 156 U.S., *supra,* this Court permitted an evidentiary ruling that kept facts from the jury which would have significantly impeached hearsay testimony. At an earlier trial for committing murder in Indian country, two witnesses, who were fully cross-examined by Mattox, presented the strongest proof

against him. Both of these witnesses died before the later trial, and the jury was given transcribed copies of their testimony.

Two persons were prepared at the later trial to testify that one of the deceased witnesses had said that his testimony had been given under duress and was untrue in essential particulars. The federal judge prevented the jury from hearing these witnesses, and because of the rationale underlying the judge's ruling, this Court held the ruling not to be reversible error. The underlying rationale for keeping the two impeaching witnesses off the stand was that the temptation is almost irresistible in criminal cases to present false evidence in order to destroy hearsay testimony when the hearsay declarant is unavailable to reveal the falsehood. *See also Chambers v. Mississippi, supra* at __ & n.21, 35 L.Ed.2d at 312 & n.21.

In what does not purport to be a constitutional ruling, this Court in *Carver v. United States*, 164 U.S. 694, 41 L.Ed. 602 (1897), held that this purpose for excluding impeaching evidence did not save the trial court's evidentiary ruling from being reversible error. At the trial—also for murder in Indian territory—the jury learned of the victim's dying declaration that Carver had shot him. The judge refused to allow Carver to present witnesses who would have testified that the deceased had made statements to them indicating an unintentional shooting. The court discussed the *Mattox* opinion and held,

> We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness or actual hostility felt toward him, the deceased may have been mistaken.

Id. at 698, 41 L.Ed. at 603.

In *Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d 1019 (1967), the rationale of preventing perjury did not justify the state trial judge's keeping an alleged accomplice from testifying. The boyfriend of Washington's ex-sweetheart had been fatally shot, and Washington's alleged accomplice was convicted and sentenced before Washington was tried. At Washington's trial, the accomplice was prepared to testify that Washington had fled the scene of the crime after unsuccessfully trying to get him to leave and before the shot was fired. Because the jurors did not hear this witness, they were markedly misled concerning Washington's culpability. This Court ruled the refusal to grant compulsory process a denial of due process of law. *See also Bruton v. United States, supra* at 133-34, 20 L.Ed.2d at 483-84 (reasons for joint trial do not justify the "clearly harmful practice" because "viable alternatives" to joint trial exist).

As the danger of harmfully misleading the jury increases, so does the need to closely examine the reason behind the evidentiary ruling. *See Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 309

> (Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g., Mancusi v Stubbs, 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.)

The converse is equally as true. If the jury is not pointedly misled, the trial will be fundamentally fair even though the underlying rationale for the ruling is weak. In *Washington v. Texas*, the very real possibility of perjury

did not justify Texas' keeping the slayer of Washington's ex-sweetheart off the stand, but the much weaker reason of conserving time, for example, may justify preventing a defendant from delving into a prosecution witness' bad acts.[29] *Cf. United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. denied*, 13 Crim. L. Rptr. 4019 (1973).

The same principle applies in determining whether hearsay has been constitutionally admitted. The underlying reason for not producing the declarant is significant in determining the trial's fundamental fairness, and his availability becomes more important as the danger of misleading the jury increases. For example, it usually does not matter whether the person who prepared a business record is available, but the availability of the victim may make a constitutional difference.

In *Barber v. Page*, 390 U.S. 719, 20 L.Ed.2d 255 (1968), Barber and Woods were jointly charged with armed robbery and one attorney represented both of them at their preliminary hearing. At the hearing, Woods waived his right not to incriminate himself and testified,

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[29]Davis asserts the following:

> The developing case law of this Court under the Sixth Amendment firmly establishes the right to cross examine with only Fifth Amendment exceptions.

(Petitioner's Brief at 16.)

> The only protection a witness is entitled to when he testifies against another in a criminal case is that found within the Fifth Amendment.

(*Id.* at 22.)

> [A]ny considerations concerning the nonconstitutional protection of an accusatory witness must necessarily yield to the confrontation rights of the Sixth Amendment.

(*Id.* at 18.)

incriminating Barber. Before Woods testified, the attorney withdrew as his counsel, but did not cross-examine Woods, although an attorney for a third co-defendant did. When Barber was brought to trial, Woods was in a federal prison in Texas and was never called. The judge permitted the introduction of Woods' prior testimony.

Even though Woods' confession was given in court and subjected to cross-examination by a defense attorney, it was still highly suspect. A confession by a man awaiting trial that implicates another is extremely suspect; *e.g.*, *Bruton v. United States, supra;* and

> [a] preliminary hearing is ordinarily a much less searching exploration into the merits than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Barber v. Page, supra at 725, 20 L.Ed.2d at 260.

Although the hearsay character of the prior testimony was available for the jurors' consideration, they most likely gave the testimony more weight than it deserved. *See Bruton v. United States, supra* at 138, 20 L.Ed.2d at 486 (Stewart, J., concurring). Furthermore, Woods' confession formed "the principal evidence" against Barber. *Barber v. Page, supra* at 720, 20 L.Ed.2d at 257. Woods was readily available by subpoena, and this Court ruled,

> While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

Id. at 725-26, 20 L.Ed.2d at 260; *see also California v. Green, supra* at 165, 26 L.Ed.2d at 501 ("Porter's

statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable despite good-faith efforts of the State to produce him."); *Berger v. California*, 393 U.S. 314, 21 L.Ed.2d 508 (1969) (preliminary hearing testimony of victim—clearly crucial evidence—introduced although he could have been subpoenaed).

An accomplice's preliminary hearing testimony that had been cross-examined by a defense attorney was introduced into evidence in *Motes v. United States*, 178 U.S. 458, 44 L.Ed. 1150 (1900). The accomplice was unavailable at the trial because of the negligence of government officers, and this Court held that although such reasons as death, insanity, and sickness would have been sufficient to excuse the absence of the accomplice, confrontation was denied in this case.[30]

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[30] Prosecutorial misconduct or negligence is a relevant factor in determining whether a trial is fundamentally fair. Thus, this Court mentioned as a distinguishing characteristic in Dutton v. Evans, *supra*, that that case did

> not involve any suggestion of prosecutorial misconduct or even negligence, as did Pointer, Douglas, and Barber.

Id. at 87, 27 L.Ed.2d at 226; *see also* Frazier v. Cupp, *supra* at 737, 22 L.Ed.2d at 691 ("Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error.").

> Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934 (1965), was a case of prosecutorial misconduct. By placing the witness on the stand and reading in the confession, the prosecutor, in effect, increased the reliability of the confession in the jury's eyes in view of the witness' apparent acquiescence as opposed to repudiation.

California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 (Harlan, J., concurring).

Evidently, the "suggestion of prosecutorial misconduct or even negligence" in *Pointer* and *Barber* was the lack in both cases of a

In *Mancusi v. Stubbs, supra,*

> the principal prosecutorial witness, one Alex Holm, did not appear. Instead, Holm's testimony was introduced through a transcript of a previous trial on the same charge.

Id. at __, 33 L.Ed.2d at 305 (Marshall, J., dissenting).

> The circumstances surrounding the giving of Alex Holm's testimony at the 1954 trial were significantly more conducive to an assurance of reliability than were those obtaining in Barber v. Page, supra. The 1954 Tennessee proceeding was a trial of a serious felony on the merits, conducted in a court of record before a jury, rather than before a magistrate. Stubbs was represented by counsel who would and did effectively cross-examine prosecution witnesses.

Id. at __, 33 L.Ed.2d at 302.

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good faith effort to produce an essential witness. (This Court did not mention the lack of a good faith effort in *Pointer*, but

> the state where the trial was held and the state where the witness had gone were signatories to the Uniform Act to Secure the Attendance of Witnesses from Without the State, which, in effect, allows interstate service of process.

Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1440 (1966); *see also* California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 ("[T]here was no showing that the witness [in *Pointer*] could not have been made available for cross-examination.").) The hearsay in both cases was very untrustworthy and extremely damaging. If the government seeks to convict with such testimony when the accuser can be put on the stand, the action can be classified as "prosecutorial misconduct or even negligence," whereas the failure to call the declarant of official records, for example, cannot be so characterized.

Keeping Green's juvenile record from the jury cannot be characterized as either misconduct or negligence on the part of the prosecutor. The record was kept out pursuant to a court rule designed to protect witnesses.

Alex Holm was a permanent resident of Sweden at the time of the second trial and Tennessee

> was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government.

Id. at ___, 33 L.Ed.2d at 301. This Court concluded that the Constitution did not require Tennessee even to notify "Mr. Holm that the trial was scheduled; and invit[e] him to come at his own expense." *Id.* at 307 (Marshall, J., dissenting); *see also Dutton v. Evans, supra* (hearsay declarant not necessary even though he could have been subpoenaed).

B. Reasons Underlying Alaska's Juvenile Records Secrecy Rule

The underlying rationale for limiting Davis' defense need not be closely examined because the jury was not significantly misled concerning Green's credibility, a fact that itself demonstrates the fundamental fairness of Davis' trial. Yet close examination of the ruling that kept Green's juvenile record from the jury and prevented full cross-examination shows that the ruling served a State purpose important enough to sustain even close cases.

One of the most revered foundations of America's juvenile court system is the concept that the offender should be shielded from public awareness of his contacts with authorities.

> [T]here is a convincing amount of evidence that publicity not only fails to deter, but often provides encouragement for further and original delinquency, publicity being the end sought by the delinquent.

Geis, *Publicity and Juvenile Court Proceedings*, 30 Rocky Mt. L. Rev. 101, 124-25 (1958).

> [A]s a result of disclosure of his juvenile record, the youth is often barred from employment, or is limited to menial jobs lacking in responsibility and fulfillment.

Comment, *Sealing of Juvenile Court Records*, 54 Minn. L. Rev. 433, 434-35 (1969).

> [W]e have firm data that virtually all juvenile delinquents are not persistent or confirmed male-factors; that they drift in and out of delinquent situations; that they are quite plastic and malleable creatures at this stage of their existence. In fact, this is the major reason why we have an institution such as the juvenile court. It should also be the major reason why we will not permit the publication of the names or other identifying data about young persons who appear before the juvenile court or who are arrested for offenses constituting juvenile delinquency.

Geis, *Identifying Delinquents in the Press*, 29 Fed. Probation 44, 45 (Dec. 1965) (footnote omitted).

Alaska rigorously protects its juvenile delinquents from publicity.[31] By statute, court permission is required before any information prepared by a state or federal employee pertaining to a minor can be released to anyone except persons charged with making a preliminary court investigation. The statute reads as follows:

> *Records.* (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's

[31] While the supposed effectiveness of laws that protect juveniles from disclosure of their deviational behavior has been judged by this Court to be "more rhetoric than reality," this Court has never indicated that successful laws of this type are undesirable. *In re* Gault, 387 U.S. 1, 24, 18 L.Ed.2d 527, 544 (1967).

permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared in the discharge of his official duty by an employee of the court or by a federal, state or city agency are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. Within 30 days of the date on which a minor reaches his 18th birthday or, if the court retains jurisdiction of a minor past his 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against him and punishments assessed against him, except for traffic offenses. No person may use records so sealed for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public by a newspaper, radio, or television station in connection with the minor's status as a delinquent or dependent child, except as authorized by order of the court.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than

> $500 or by imprisonment for not more than one year or by both.

Alaska Stat. 47.10.090.[32]

Specifically regarding the release of juvenile records in court, the Alaska Legislature has dictated, "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court . . .", Alaska Stat. 47.10.080(g), and the Alaska Supreme Court has promulgated a rule that states,

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Alaska R. Juv. P. 23.[33] The court rule, unlike Alaska Stat.

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[32] Until 1972, this statute did not contain the sealing provisions:

[33] Rule 609(d) of the Rules of Evidence for United States Courts and Magistrates reads as follows:

> Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Rules of Evidence, 34 L.Ed.2d, No. 5, 69 (1973).

The advisory committee's note on this rule appears as follows:

> The prevailing view has been that a juvenile adjudication is not useable for impeachment. . . . This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of parens patriae, the juvenile adjudication was considered to lack the precision and general probative value

47.10.080(g), leaves no room for interpretation and binds the judge unless, of course, adherence to it deprives the accused of a constitutional right.[34]

of the criminal conviction. While In re Gault, 387 US 1, 87 S Ct. 1428, 18 L Ed 2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While Gault was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 US at 25, 87 S Ct 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum L Rev 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See Giles v Maryland, 386 US 66, 87 S Ct 793, 17 L Ed 2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore §196; 3 *id.* §§924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Id. at 71.

Of course federal rules of evidence do not necessarily establish constitutional confrontation boundaries. Dutton v. Evans, *supra* at 80-81, 83, 27 L.Ed.2d at 222-24 ("For this Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause."); California v. Green, *supra* at 163 n.15, 26 L.Ed.2d at 500 n.15.

[34] For example, Davis' jury might have been unconstitutionally misled had Green been facing charges and had his testimony been uncorroborated.

Green, who was only 17 years of age at the time he testified, was then being rehabilitated by probation. He had been expelled from school for skipping classes the year before, and at the time of trial he was working for the Neighborhood Youth Corps in Chugiak. (A. 27a.) Under Alaska's procedures for ensuring tight secrecy, he had good reason to believe that his juvenile record would not be exposed. Disclosure of his record might have shattered his confidence in the State's sincerity in fostering his rehabilitation.

In addition, disclosure of his record could well have had other adverse effects on Green's rehabilitation. Although inevitably some people will learn of a delinquent's escapades, disclosure of Green's record at the trial would have carried the potential of wide dissemination. It was certainly newsworthy that the State's star witness, who happened to live near the place where the safe was found, had been adjudicated a delinquent for acts of burglary. *Cf.* Alaska Stat. 47.10.090(d).

Davis points out that the potential for wide dissemination would have been lessened by excluding the public during disclosure. However, even if this extraordinary measure of excluding the public had been employed, a measure that itself carries constitutional overtones, *see generally* Case Note, 1 Fordham Urban L.J. 308 (1972), twelve additional persons would have learned of Green's record. This occurrence obviously would have created a greater risk of harmful dissemination.

Not only would disclosing Green's record have had an adverse rehabilitative effect on him, if juvenile records were revealed in very many cases, persons with such records would be less likely to help stop criminal activity or aid the government in obtaining convictions. *Cf.* 3a Wigmore, *Evidence* §921, at 724 (Chadbourn rev. 1970); Ash, *On Witnesses: A Radical Critique of Criminal Court*

Procedures, 48 Notre Dame Law. 386 (1972). In states with juvenile record secrecy laws akin to Alaska's, a juvenile record will likely remain secret for all practical purposes; and if being a witness for the government means at least partially opening the door to a closet of skeletons, a person might well hesitate to stop a crime or report its occurrence.

The State thus had strong underlying reasons for limiting cross-examination and preventing disclosure of Green's juvenile record. Even if the evidentiary ruling in question had caused the jury to be so misled concerning Davis' culpability that a denial of due process loomed close in this case, the underlying rationale for the ruling would show that the trial was fair.

CONCLUSION

The prohibition of disclosing a witness' juvenile record by either cross or direct examination is a well-recognized rule of evidence. Note 33 *supra; cf. Duttons v. Evans, supra* at 87, 27 L.Ed.2d at 226 ("His testimony . . . was admitted in evidence under a coconspirator exception to the hearsay rule long recognized under state statutory law."); *Bruton v. United States, supra* at 128 n.3, 20 L.Ed.2d at 481 n.3 ("There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."); *McCray v. Illinois, supra* at 308, 18 L.Ed.2d at 69 ("What Illinois and her sister States have done is no more than recognize a well-established testimonial privilege, long familiar to the law of evidence."). The judge's ruling somewhat hindered Davis in presenting his defense, but his trial was not "so egregiously unfair upon the issue of guilt or innocence as to

offend the provisions of the Fourteenth Amendment that no State shall 'deprive any person of life, liberty, or property without due process of law. . . .' " *Spencer v. Texas*, 385 U.S. 554, 559, 17 L.Ed.2d 606, 611 (1967). The State urges this Court to affirm the Alaska Supreme Court's holding.

Respectfully submitted,

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Supreme Court
FILED
DEC 4
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-5794

JOSHAWAY DAVIS,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALASKA

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent, State of Alaska, admits that the limitation of Petitioner Davis' cross-examination of witness Green did mislead the trial jury to the extent that the foreclosed cross-examination would have impeached Green's credibility (respondent's brief, pages 3, 13, 14, 41, 56).[1] Respondent claims that such cross-examination would have failed to raise any meaningful doubts of guilt

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[1] The Supreme Court of Alaska found that Green's identification was crucial to the prosecution's case (A. 56a). The entire thrust of petitioner's trial defense was that the identification was erroneous.

in the jurors' minds, apparently alleging harmless error. Respondent also contends that the underlying rationale prohibiting the disclosure of Green's juvenile record is so strong that Davis' trial would have been fundamentally fair even if the jurors had been significantly misled concerning the realibility of Green's testimony. An examination of respondent's positions and arguments demonstrates that they are without merit. Approaching respondent's brief in the order in which he has presented the issues the following can be discerned:

I.

FACTUAL ERROR WITHIN RESPONDENT'S STATEMENT OF THE CASE AND INTRODUCTION TO ARGUMENT

In his Statement of the Case respondent misstates the evidence. On page 7 of his brief he states that the tires on petitioner's automobile were compared with the tire tracks where the safe was found and the conclusion was reached that the same car had made both tracks (Also respondent's brief, page 38). The testimony referred to of witness Gray (Tr. 147-158) shows Gray as a partisan witness who very much wanted to say that the tire tracks at the scene of the discovered safe matched the tires on petitioner's automobile in order to fit his theory of the case. However, after discussion out of the hearing of the jury about Gray's testimony on this issue, his testimony was stricken as he had not been qualified as an expert on tire tracks (Tr. 155). Gray's adversary role was again made evident when he admitted on re-cross-examination that he was not an expert on tires (Tr. 156), and again, non-responsively, volunteered that the tire tracks

"appeared to be the same", (Tr. 157), and, most importantly, stated he had come to that conclusion only because the tire tracks at the scene were made by snow tires and there were snow tires upon petitioner's vehicle. Gray apparently was willing to so conclude even though he could not even identify the tire brands (Tr. 156). No expert testified concerning actual comparisons of the tire imprints. Tire prints were not argued to the trial court or the trial jury by respondent nor were they cited by the Supreme Court of Alaska in ruling on the sufficiency of the evidence (A. 57a).

On page 8 of his brief respondent states that the fibers found in the trunk of petitioner's car "matched" fibers of the safe insulation. Actually, the witness could not say that the fibers came from the safe in question. They could have come from a different kind of safe or not a safe at all (Tr. 206-207).

As respondent discusses on pages 8 and 9 of his brief, there was a problem with a lineup in the case. Respondent's position as stated later in his argument (respondent's brief, pages 38-40) is that this lineup itself was constitutionally valid and therefore a source of independent corroboration of Green's testimony. The Supreme Court of Alaska in essence found that the lineup did violate *United States v. Wade*, 388 US 218 (1967), but that the error was harmless as the trial identification was sufficiently independent.

On pages 10, 11, and 12 of respondent's brief he attempts to show that petitioner's defense that Green feared himself to be a burglary suspect was in fact not supported by the evidence, citing the cross-examination of witness Green. This argument is both self-serving and self-defeating as it supports petitioner's position that he was in fact denied the opportunity to effectively cross-

examine Green. Respondent states in footnote 3 of his brief (page 13) that Green's negative response to counsel's question as to whether or not he had ever been questioned before by law enforcement officers was truthful as the question was qualified with "like that". The attempted distinction is that the inquiry was as to his status as a prospective witness and not as a prospective accused. This assertion underlines again the need for allowing adequate cross-examination to determine the facts to avoid the necessity of such conjecture at this date. Further questioning was curtailed by a sustained objection (A. 34a).

In footnote 4 (page 14) of his brief respondent states that the only value further cross-examination of Green and disclosure of Green's juvenile record would have had to petitioner was for purposes of impeachment. Petitioner has repeatedly pointed out in his opening brief that additional grounds for permitting cross-examination are that the adjudication of burglary and circumstances of probation surrounding it would have shown bias, self-interest, motive and apprehension thereby affecting credibility. *People v. Smallwood,* 306 Mich. 49, 10 N.W.2d 303, 147 ALR 443 (1943).[2] Respondent concedes on page 15 of his brief that witness Green's

[2]While impeachment and attack on credibility can be synonymous, in this context impeachment is limited to an attack on general reputation through evidence of specific wrongful acts under Alaska Civil Rule 43(g)(11)b. At common law the conviction for any felony or a misdemeanor involving dishonesty rendered the convicted person incompetent as a witness. *Wigmore on Evidence* Vol. 2 §520. The additional grounds cited by petitioner form a basis for a specific attack on credibility of specific testimony. This was discussed by counsel during argument before the trial court on the motion to suppress (A. 4a-22a).

testimony formed a substantial part of the prosecution's case and that in fact cross-examination as to Green's juvenile record would have placed the jurors in a better position to evaluate his testimony.

II.

RESPONDENT'S CITATIONS TO AND DISCUSSION OF THE HEARSAY RULE AS APPLIED TO THE CONFRONTATION CLAUSE IS LARGELY IRRELEVANT.

Section II of respondent's brief contains a thorough and informative discussion of the hearsay rule, its exceptions, and their relationship to the confrontation clause of the Sixth Amendment. The case presently before the Court has nothing to do with hearsay and therefore this discussion and the cases cited therein are neither helpful or relevant. However, some of these cases contain language that supports the rationale of petitioner's position.

Dutton v. Evans, 400 US 74 (1970), cited by respondent concerned a hearsay statement allegedly made by a co-conspirator admissible at trial under a Georgia rule. There it was held that the statement's admission did not violate the Sixth Amendment as the witness could have been called by the accused. This Court wrote the following:

> In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here. That one

> witness testified to a brief conversation about Evans he had had with a fellow prisoner in the Atlanta Penitentiary. The witness was vigorously and effectively cross-examined by defense counsel. His testimony, which was of peripheral significance at most, was admitted in evidence under a coconspirator exception to the hearsay rule long established under state statutory law. The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application in the circumstances of this case did not violate the Constitution. 400 US 88

The Court emphasized the desirability of vigorous and effective cross-examination by defense counsel of the witness actually proffering the statement.

California v. Green, 399 US 149 (1970), also cited by respondent in his hearsay discussion, concerned the permissible use of a preliminary hearing transcript at trial. This Court notes:

> Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination. 399 US 158

Again, the necessity of full and effective cross-examination of prosecution witnesses is emphasized. In distinguishing *Barber v. Page*, 390 US 719 (1968), the Court stated:

> In the present case respondent's counsel did not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. 399 US 165

Cited also by respondent under his hearsay heading is last Term's case of *Chambers v. Mississippi*, ___ US ___, 35 L.Ed.2d 297, 309, earlier cited by petitioner as authority for his position. This Court stated there:

> Of course the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g. *Mancusi v. Stubbs*, 408 US 204, 33 L.Ed.2d 293, 92 S.Ct. 2308 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact finding process" and requires that the competing interest be closely examined. *Berger v. California*, 393 US 314, 315, at L.Ed.2d 508, 89 S.Ct. 540 (1969).

The two cases cited there by this Court concern respectively the permissible use of testimony from a prior trial in which the issues were identical and full cross-examination was present and the impermissible use of a preliminary hearing transcript where there was not adequate cross-examination.

In *Berger*, this Court said:

> As we pointed out in *Barber v. Page*, one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses. 390 US, at 721, 20 L.Ed.2d 158 (sic) 398 US 315.

What is significant is that this Court has permitted in a few limited situations the use of hearsay in lieu of actual testimony. However, these issues touch only slightly upon the question here presented–the limitation of cross-examination when confrontation is actually being accomplished. In these circumstances the Fifth Amend-

ment is the only limiting factor.[3] *Alford v. United States*, 282 US 687 (1931). *Smith v. Illinois*, 390 US 129 (1968).

III.

THE LIMITATION OF CROSS-EXAMINATION WAS NOT HARMLESS ERROR AS THERE IS NOT SUFFICIENT UNTAINTED EVIDENCE TO SUPPORT A CONVICTION AND, NOTWITHSTANDING, THE PROPER TEST IS WHETHER IT CAN BE SAID BEYOND A REASONABLE DOUBT THAT KNOWLEDGE OF GREEN'S RECORD AND PROBATION WOULD NOT HAVE AFFECTED THE TRIAL JURY'S VERDICT.

Under IV of respondent's brief it is asserted that the limitation of cross-examination of witness Green did not significantly mislead the jury. On page 35 of his brief respondent asserts that Green's juvenile record was minimally impeaching and that Green's testimony would not have suffered more by full cross-examination than it would have by disclosure of his juvenile record through another witness. It is argued by petitioner that the record itself and alone should be brought before the trier of fact in all cases of juvenile prosecution witnesses for the jury to evaluate. In petitioner's case, there are even stronger reasons as the existence of a burglary conviction, and the ensuing probation, goes to establish bias, self interest, apprehension and motive on the part of the essential witness Green. Petitioner's entire defense was to discredit witness Green. Not only was the safe found where Green lived but it was next to his truck (A. 28a), a fact not heretofore emphasized.

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[3]The exercise of which may deprive the accused of adequate confrontation. *Bruton v. United States*, 391 US 123 (1968).

Respondent asserts the fact that Green was on probation did not mean he had a meaningful motive that might have colored his testimony. Respondent asserts there is no factual basis to find that Green had any realistic hope of a benefit from his testimony. There is nothing in the record to support this statement and, notwithstanding, the question is what Green believed in his own mind and only a jury can properly determine this. Respondent states that nothing in Green's juvenile record indicates that he was receiving any favors for help, again citing from evidence not in the record and not presented to the jury. Interestingly, in footnote 23 of his brief (page 36) respondent states that he will furnish this Court with Green's entire juvenile file if it so requests. This offer flies in the face of respondent's continued assertion that a juvenile record must remain secret except in the limited area of sentencing. If this Court is entitled to Green's entire juvenile file in order to ascertain the truth, why was not Davis's jury?

Respondent states that the record clearly demonstrates full cross-examination would not have shown Green was in any danger of being accused of a burglary or that he actually would receive any favors for his help (respondent's brief, page 36). Again, the relevant question is what Green believed in his own mind, particularly at the time of the original photographic identification, after that his identification was frozen. Continuing, respondent maintains that the record indicates that the police did not suspect Green of having committed a burglary. Petitioner had already argued that he should have been permitted to cross-examine witness Gray on this particular point with the fact of Green's conviction of burglary (petitioner's brief, page 20). Respondent concludes that none of Green's actions indicated guilt. Guilt is not necessary nor

particularly relevant; what is important is that Green had fear of prosecution and desired to better his position in the eyes of the law.

Commencing on the bottom of page 36 and continuing on page 37 and 38 of respondent's brief it is in essence asserted that any error in limitation of cross-examination was harmless since there was other adequate evidence to convict. Approaching this question with the *Chapman v. California,* 386 US 18 (1967), test it must be determined what evidence existed independent of witness Green's testimony. Without his testimony the only evidence that was against petitioner was that paint chips and insulation fibers that could have originated from a safe were found in the trunk of his rented car (Tr. 180, 206). This cannot be sufficient evidence to prove beyond a reasonable doubt that Davis committed the crimes of burglary and larceny. Respondent, however, believes that this evidence was sufficient even if the jury felt that Green had a strong motive either to fabricate or to hastily made an identification and stick to it (respondent's brief, page 37).

Respondent argumentatively asserts that the paint chips and safe insulation fibers which were found in the trunk of petitioner's rented car "obviously came from the stolen safe" (respondent's brief, page 37). Yet the only evidence presented was that these fibers and chips *could have* come from *a* safe (Tr. 180, 206). Going on, respondent states that there is nothing in the record that indicates that Green's description to the police officers of the man he talked with failed to match Davis' appearance. This is not true. Investigator Weaver testified that as he was bringing Green to Anchorage for the identification Green described the shorter of the two blacks he saw as having a mustache (Tr. 231). However, Green identified Petitioner Davis in court as being the shorter of the two

persons he had seen at the scene (Tr. 211) but then stated that the man he saw where the safe was found did not have a mustache. Green also testified that one man was standing beside the car and one was to the rear (A. 29a, 40a). However, he had given a prior statement that both were behind the car (A. 44a).

In continued support of his theory of harmless error and other independent evidence respondent cites items of evidence that were never even presented to the jury. On page 37, he states that petitioner had paid for the rented car in question from an unusually large roll of bills and two rolls of quarters; he also states that Green said one of the men was wearing a brown or black mackinaw and that the safe had reddish brown fibers caught on it. Respondent admits that this evidence was never considered by the jury and it is therefore difficult to understand how he can cite purported facts not offered at trial in an attempt to support a jury's verdict.

Respondent also now maintains that the tires of petitioner's vehicle matched the set of tracks where the safe was found.[4] As has been discussed previously, this is a misstatement of fact. Respondent maintains that the record is replete with evidence that the photographic and lineup identifications were not suggestively induced. This of course is what the jury was led to believe when they were not adequately informed of the facts which would establish bias, self interest, motive and apprehension in Green's mind. The inadequate nature of the lineup has already been discussed. The lineup was after petitioner was formally charged, *Kirby v. Illinois*, 406 US 682 (1972).

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[4]There were actually two sets of tracks where the safe was found (Tr. 156).

In support of his position respondent asserts that Green had no trouble selecting the photograph of petitioner even though it was ten years old and differed from Petitioner Davis' appearance at the time of his arrest (respondent's brief, page 38). This fact would seem to be a basis to suspect the identification rather than support it.

IV.

BRADY v. MARYLAND REQUIRES THE ADMISSION OF GREEN'S JUVENILE RECORD AND PROBATIONARY STATUS AS IT IS FAVORABLE TO THE ACCUSED.

On page 41 of his brief respondent again concedes that the jury was somewhat misled concerning Green's credibility and that Green's testimony added to the State's case but concludes that this inroad upon the integrity of the fact finding process did not deprive Petitioner Davis of the due process of law citing *Giles v. Maryland*, 385 US 66 (1967). *Giles v. Maryland* raised the issue of the prosecution's duty to disclose all evidence useful to the defense and was remanded for a determination of whether in the original trial of the case the prosecution allowed false evidence to go uncorrected. Indeed, such an issue would be here presented had respondent kept from petitioner the fact that Green had been convicted of burglary and was on probation at the time of trial which act or omission would have violated *Brady v. Maryland*, 373 US 83 (1963). As suppression of this information from petitioner would constitute a violation of the Due Process Clause of the Fourteenth Amendment, so did its suppression at trial violate the Fourteenth Amendment through the Sixth Amendment. If it has any meaning,

Brady not only gives the accused access to exculpatory testimony but an opportunity to offer it on his behalf.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies. *Washington v. Texas,* 388 US 14, 17 (1967).

Thereafter respondent persists in his assertion that the fact of conviction of burglary does not in and of itself show motive for perjury. This argument again ignores the thrust of petitioner's complaint. Petitioner is stating that Green's identification was unreliable because he was motivated by fear of prosecution and a motive for self-protection and self-betterment. Petitioner does not need to actually demonstrate a deal between the prosecution and the witness or an actual threat of prosecution; the possibility that something of this nature may have been present in Green's mind is sufficient. *Alford v. United States,* 282 US 687 (1931), *Smith v. Illinois,* 390 US 129 (1968).

V.

THE PURPOSES BEHIND ALASKA'S JUVENILE RECORDS SECRECY RULE ARE WEAK WHEN COMPARED TO THE SIXTH AMENDMENT AND THE NECESSITY OF A FAIR TRIAL.

Petitioner has argued that the only limitations upon cross-examination are those found within the Fifth Amendment. Respondent believes that there are "strong purposes" behind Alaska's Juvenile Record Secrecy Act; purposes so strong as to justify infringement upon the Right of Confrontation.

After lengthy discussion of hearsay again, petitioner's demonstration of strong purposes are:

1. Disclosure of Green's record might have shattered his confidence in the State's sincerity in fostering his rehabilitation after he had good reason to believe that his juvenile record would not be exposed.

2. Disclosure of Green's record at the trial would was "certainly newsworthy that the State's star witness who happened to live near the place where the safe was found, had been adjudicated a delinquent for acts of burglary." (respondent's brief, page 55)

The purposes cited are not compelling, they can scarcely be said to form a rational basis for the rule's justification. A reasonable mind can find little danger of the first and in fact more danger if Green believed that the judicial system was not concerned with truth. The second reason only emphasizes the significance of the suppression. What is newsworthy is also highly probative.

Respondent replies to petitioner's suggestion of a closed courtroom if there is actual danger in dissemination, complaining that twelve additional persons would learn of the juvenile's record. This is unavoidable in the judicial process; it cannot operate in a vacuum. To date, many persons in the district attorney's office, the police department, the Alaska Superior Court, the Alaska Supreme Court, and this Court, all are aware of Green's juvenile record and it is extremely doubtful that he is suffering for it. A proper and timely instruction to the jury after a verdict would suffice to all but eliminate any danger.

Respondent warns that if being a witness for the prosecution means at least partially opening a door to a

closet of skeletons a person might well hesitate to stop a crime or report its occurence. This statement seems to be predicated on a theory of presumption of guilt. When one stands accused of a crime he is entitled to explore into the secret closets of his accusers. To permit less is to permit darkness.

CONCLUSION

Respondent concludes that the prohibition against disclosing a witness's juvenile record by either cross or direct examination is a well recognized rule of evidence. It is not a rule of evidence, it is only a statutory prohibition and one that accedes to the Sixth Amendment right of confrontation. As a competing interest it does not survive close examination. *Chambers v. Mississippi*, ___ US ___, 35 L.Ed.2d 297, 309 (1973). For these reasons and those stated in petitioner's brief the Judgment of the Supreme Court of Alaska should be reversed.

Respectfully submitted,

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Anchorage, Alaska 99501
Attorney for the Petitioner

November 1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAVIS *v.* ALASKA

CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 72-5794. Argued December 12, 1973—
Decided February 27, 1974

Petitioner was convicted of grand larceny and burglary following a trial in which the trial court on motion of the prosecution issued a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to a burglary and his probation status at the time of the events as to which Green was to testify. The trial court's order was based on state provisions protecting the anonymity of juvenile offenders. The Alaska Supreme Court affirmed. *Held:* Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments. Pp. 7–13.

(a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing Green's possible bias. Pp. 8–11.

(b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 11–13.

499 P. 2d 1025, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring statement. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-5794

Joshaway Davis, Petitioner, v. State of Alaska.	On Writ of Certiorari to the Supreme Court of Alaska.

[February 27, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile deliquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

(1)

When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970, well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square and weighing several hundred pounds, had been removed from the premises.

Later that afternoon the Alaska State Troopers received word that a safe had been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard

Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he had seen and spoken with two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February 18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

At trial evidence was introduced to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe. Further, the trunk of the car contained particles which were identified as safe insulation, characteristic of that found in Mosler safes. The insulation found in the trunk matched that of the stolen safe.

Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with "something like a crowbar" in his hands. Green identified petitioner at the trial as the man with the "crowbar." The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in the course of cross-examination. At the time of the trial and at the time of the events Green testified to, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at the time of the Polar Bar robbery, but had turned 17 prior to trial.

In opposing the protective order, petitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for robbery. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23,[1] and Alaska Stat. § 47.10.080 (g).[2]

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[1] Rule 23 provides:

"No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where

[*Footnote 2 is on p. 4*]

Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about any suspicions the police might have been expected to harbor against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

Defense counsel cross-examined Green in part as follows:

"Q. Were you upset at all by the fact that this safe was found on your property?

"A. No, sir.

"Q. Did you feel that they might in some way suspect you of this?

"A. No.

"Q. Did you feel uncomfortable about this though?

"A. No, not really.

"Q. The fact that a safe was found on your property?

"A. No.

"Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

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the superior court, in its discretion, determines that such use is appropriate."

[2] Section 47.10.080 (g) provides in pertinent part:

"The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court. . . ."

"A. I thought they might ask a few questions is all.

"Q. Did that thought ever enter your mind that you—that the police might think that you were somehow connected with this?

. . . . . .

"A. No, it didn't really bother me, no.

"Q. Well, but . . . .

"A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

"Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in mind, not that you . . . .

"A. That came across my mind, yes, sir.

"Q. That did cross your mind?

"A. Yes.

"Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

"A. Yes, sir.

"Q. And then went into the investigator's room with Investigator Gray and Investigator Weaver?

"A. Yeah.

"Q. And they started asking you questions about—about the incident, is that correct?

"A. Yeah.

"Q. Had you ever been questioned like that before by any law enforcement officers?

"A. No.

"MR. RIPLEY: I'm going to object to this, Your

Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind . . .

"THE COURT: I'll sustain the objection."

Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, Green's protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged. The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable that Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold "No" answer would have been given by Green absent a belief that he was shielded from traditional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of Green's February 16 confrontation with the two men on the road.

The Alaska Supreme Court affirmed petitioner's conviction,[3] concluding that it did not have to resolve the

[3] In the same opinion the Alaska Supreme Court also affirmed

potential conflict in this case between a defendant's right to a meaningful confrontation with adverse witnesses and the State's interest in protecting the anonymity of a juvenile offender since "our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the juvenile in considerable detail concerning the possibility of bias or motive." *Davis* v. *State*, 499 P. 2d 1025, 1036 (1972). Although the court admitted that Green's denials of any sense of anxiety or apprehension upon the safe being found close to his home were possibly self-serving, "the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the youth and pass on his credibility." *Ibid.* The court concluded that, in light of the indirect references permitted, there was no error.

Since we granted certiorari limited to the question of whether petitioner was denied his right under the Confrontation Clause to adequately cross-examine Green, 410 U. S. 925 (1973), the essential question turns on the correctness of the Alaska court's evaluation of the "adequacy" of the scope of cross-examination permitted. We disagree with that court's interpretation of the Confrontation Clause and we reverse.

(2)

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under *Pointer* v. *Texas*, 380 U. S. 400 (1965). Confrontation means more than being al-

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petitioner's conviction, following a separate trial, for being a felon in possession of a concealable firearm. That conviction is not in issue before this Court.

lowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965). Professor Wigmore stated:

> "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in original. 5 Wigmore, Evidence § 1395, at 123 (3d ed. 1940).)

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i. e.*, discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as

they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A Wigmore, Evidence § 940, at 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959).[4]

In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.[5]

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been per-

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[4] In *Greene* we stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . . ." 360 U. S., at 496.

[5] "[A] *partiality* of mind at some *former time* may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying." (Emphasis in original; footnotes omitted.) 3A Wigmore, § 940, at 776 (Chadbourn rev. 1970).

mitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." *Douglas* v. *Alabama*, *supra*, 380 U. S., at 419. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford* v. *United States*, 282 U. S. 687 (1931),[6] as well as of Green's possible concern that he might be a suspect in the investigation.

We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and

[6] Although *Alford* involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt. In *Smith* v. *Illinois*, 390 U. S. 129, 132–133 (1968), we relied, in part, on *Alford* to reverse a state criminal conviction on confrontation grounds.

credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis*, 384 U. S. 1, 3." *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968).

(3)

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault*, 387 U. S. 1, 25 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to

Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.

In *Alford* v. *United States*, *supra*, we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as "given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States." 282 U. S., at 693. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

> "[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." 282 U. S., at 694.

As in *Alford*, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State can-

not, consistent with right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-5794

Joshaway Davis, Petitioner, v. State of Alaska.	On Writ of Certiorari to the Supreme Court of Alaska.

[February 27, 1974]

MR. JUSTICE STEWART, concurring.

The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case "in order to show the existence of possible bias and prejudice . . ." p. 9, *supra*. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

SUPREME COURT OF THE UNITED STATES

No. 72-5794

Joshaway Davis, Petitioner, v. State of Alaska.	On Writ of Certiorari to the Supreme Court of Alaska.

[February 27, 1974]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a state appellate court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to the defense. Yet the Court insists on second-guessing the state courts and in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone far enough. I would not undertake this task, if for no other reason than that I have little faith in our ability, in fact-bound cases and on a cold record, to improve on the judgment of trial judges and of the state appellate courts who agree with them. I would affirm the judgment.